II

(Non-legislative acts)

DECISIONS

COMMISSION DECISION (EU) 2015/1225

of 19 December 2012

regarding injections of capital by SEA SpA into SEA Handling SpA (Case SA.21420 (C 14/10) (ex NN 25/10) (ex CP 175/06))

(notified under document C(2012) 9448)

(Only the Italian text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

Having regard to the Agreement on the European Economic Area, and particularly Article 62(1)(a) thereof ([1]),

Having called on interested parties to submit their comments under to the provisions cited above ([2]) and having regard to the comments submitted,

Whereas:

1. PROCEDURE

(1) In a letter dated 13 July 2006, the Commission received a complaint concerning the alleged aid paid to the company SEA Handling SpA ('SEA Handling'), which provides ground handling services at Milan Malpensa and Milan Linate airports. The complaint was initially filed under the number CP 175/06.

(2) By letter dated 6 October 2006, the Commission asked the Italian authorities for clarification regarding the complaint. By letter dated 21 December 2006, the Italian authorities asked for an extension of the time allowed for an answer.

(3) By letter dated 11 January 2007 the Commission allowed that extension. By letter dated 9 February 2007, the Italian authorities provided the requested clarification.

(4) By letter dated 30 May 2007, the Commission informed the complainant that there was insufficient information to show that the state resources criterion in Article 107(1) of the Treaty on the Functioning of the European Union ('TFEU') was met in the case. Consequently, in accordance with Article 20(2) of Council Regulation (EC) No 659/1999 ([3]), there were insufficient grounds for taking a view of the case. By letter dated 2 July 2007, the complainant provided additional information. In the light of that information the Commission decided to review the complaint.

(5) By letter dated 3 March 2008, the Commission asked the Italian authorities to provide a copy of the trade union agreement concluded on 26 March 2002. By letter dated 10 April 2008, the Italian authorities provided the requested document.

(6) By letter dated 20 November 2008, the Italian authorities sent the Commission the union agreement concluded on 13 June 2008.

([1]) OJ L 1, 3.1.1994, p. 3.
([2]) OJ C 184, 22.7.2008, p. 34.
([3]) Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999, p. 1).

(7) By letter dated 23 June 2010, the Commission notified the Italian authorities that it had decided to initiate the procedure provided for in Article 108(2) of the TFEU, and asked the Italian authorities to provide within one month all data and information necessary to evaluate the compatibility of the measures in question.

(8) By letter dated 19 July 2010, the Italian authorities requested an extension of the time-limit for an answer until 20 September 2010; the Commission replied, allowing the extension, on 23 July 2010.

(9) On 20 September 2010, the Italian authorities submitted the comments of the Municipality of Milan regarding the Commission's decision to initiate the formal investigation procedure.

(10) The Commission's decision to initiate the formal investigation procedure ('the opening decision') was published in the *Official Journal of the European Union* ([4]). The Commission called on interested parties to submit their comments concerning the measures in question within one month of the date of publication.

(11) By letter dated 11 February 2011, SEA Handling requested that the deadline for submission of its comments on the opening decision be extended until 21 March 2011. By letter dated 23 February 2011 the Commission allowed that extension.

(12) By letter dated 25 February 2011, […] (*) requested that the deadline for submission of its comments on the opening decision be extended until 25 March 2011.

(13) By letter dated 21 March 2011, SEA Handling and SEA SpA ('SEA') sent the Commission joint comments on the opening decision.

(14) By letter likewise dated 21 March 2011, […] sent the Commission its comments on the opening decision.

(15) By letter dated 7 April 2011, the Commission forwarded the comments of the interested parties to the Italian authorities, and asked the Italian authorities to submit their observations by 16 May 2011.

(16) By letter dated 18 April 2011, the Italian authorities asked the Commission to extend the deadline for their observations on the interested parties' comments until 2 June 2011. By letter dated 28 April 2011, the Commission allowed the Italian authorities that extension.

(17) By letter dated 1 June 2011, the Italian authorities submitted their observations. They also submitted new arguments based on a study carried out by a consultant.

(18) By letter dated 11 July 2011, the Commission urged the Italian authorities to submit the information requested in paragraph 5 of the opening decision, which had not yet been provided either by the Italian authorities or by SEA.

(19) By letter dated 28 July 2011, the Italian authorities asked the Commission to extend the deadline for submission of the requested information until 15 October 2011. By letter dated 8 August 2011, the Commission allowed an extension of the deadline until 15 September 2011.

(20) By letter dated 26 August 2011, the Italian authorities informed the Commission that they considered that the extension of the deadline allowed in response to their initial request was insufficient.

(21) By letter dated 15 September 2011, the Italian authorities submitted their reply to the Commission's request for information. By letter dated 18 October 2011, the Italian authorities submitted a translation into English of the document contained in Annex 5 to the previous submission.

(22) By letter dated 21 October 2011, the Italian authorities supplemented Annex 12 to the previous submission by supplying information provided by the Municipality of Milan. By letter dated 7 November 2011, the Italian authorities submitted a translation of those observations into English.

(23) On 19 June 2012 a meeting was held between Commission staff and the Italian authorities. After the meeting, in letters dated 2 July 2012 and 10 July 2012, the Italian authorities submitted fresh arguments in support of their view of the measures under examination. At the request of the Italian authorities, a further meeting with Commission staff took place on 23 November 2012. The Italian authorities there submitted substantially the same arguments as at the previous meeting.

([4]) OJ C 29, 29.1.2011, p. 10.
(*) Confidential information.

2. SUMMARY OF THE MEASURES

(24) This decision concerns injections of capital by SEA into its subsidiary SEA Handling, from 2001 to 2010, which were intended essentially to cover operating losses suffered by SEA Handling.

2.1. *ALLEGED RECIPIENT OF THE AID*

(25) The beneficiary of the measures in question is SEA Holding, which is wholly owned by SEA. SEA is a company that manages the Milan airport system, which comprises Linate and Malpensa airports. It is a limited company (SpA) established under private law, which during the relevant period was owned almost entirely by two public bodies, the Municipality of Milan (84,56 %) and the Province of Milan (14,56 %), along with some other small public and private shareholders (0,88 %). In December 2011, 29,75 % of SEA's capital was sold to the private fund F2i (Fondi italiani per le infrastrutture).

(26) The activities of SEA are divided as follows:

(a) general airport management: implementation and management of air transport infrastructures;

(b) ground handling: ground handling services for passengers, aircraft, baggage and freight;

(c) related activities: commercial activities in airports, including sale to the public of various services, duty-free goods, management of newspaper kiosks, restaurants, advertising, parking, vehicle rental, and management and maintenance of infrastructures intended for non-air activities, such as tourist accommodation and logistics services. These activities are carried out directly by SEA or by other parties under specific contracts with SEA.

(27) SEA Handling was established following the entry into force of Legislative Decree No 18/99 of 13 January 1999 ([5]), which transposed into Italian law Council Directive 96/67/EC ([6]): that Directive imposed the requirement to keep separate accounts for activities related to the provision of the services referred to above ([7]). With the formation of SEA Handling, SEA proceeded to separate this set of activities in accounting and legal terms ([8]). In addition to managing Malpensa and Linate airports, SEA provides various services which are secondary and complementary to air transport.

(28) SEA Handling went into operation on 1 June 2002. Until 1 June 2002 ground handling services at Linate and Malpensa airports were provided directly by SEA ([9]).

2.2. *THE MEASURES UNDER EXAMINATION*

(29) According to the information supplied to the Commission, SEA Handling received subsidies from SEA from 2002 onward, in the form of capital injections intended essentially to cover its operating losses.

(30) The amounts of SEA Handling's losses were as follows ([10]):

— in 2002, SEA Handling recorded a total loss of EUR 43 639 040,39 (1 June 2002-31 December 2002),

— in 2003, SEA Handling recorded a total loss of EUR 49 489 577,23 (1 January 2003-31 December 2003),

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([5]) *Gazzetta Ufficiale* 28, 4.2.1999.

([6]) Council Directive 96/67/EC of 15 October 1996 on access to the groundhandling market at Community airports (OJ L 272, 25.10.1996, p. 36).

([7]) Article 4 of Directive 96/67/EC states that 'Where the managing body of an airport, the airport user or the supplier of groundhandling services provide groundhandling services, they must rigorously separate the accounts of their groundhandling activities from the accounts of their other activities, in accordance with current commercial practice ... An independent examiner appointed by the Member State must check that this separation of accounts is carried out. The examiner shall also check the absence of financial flows between the activity of the managing body as airport authority and its groundhandling activity.'

([8]) On 1 December 2011, the Commission adopted the 'Better Airports' package. This package includes a proposal to review the rules on ground handling, especially in order to improve the quality and efficiency of ground handling services at airports. It also provides for the legal separation of ground handling activities from airport management. It would increase from two to three the minimum number of ground handling service providers available to airlines at large airports for key ground handling services that are still restricted, namely baggage management, ramp handling, refuelling and oil, freight and mail services.

([9]) SEA Handling Srl, which existed prior to the founding of SEA Handling, was formed in 1998, but was never operational.

([10]) Accounts at 31 December each year.

— in 2004, SEA Handling recorded a total loss of EUR 47 962 810 (1 January 2004-31 December 2004),

— in 2005, SEA Handling recorded a total loss of EUR 42 430 169,31 (1 January 2005-31 December 2005),

— in 2006, SEA Handling recorded a total loss of EUR 44 150 435 (1 January 2006-31 December 2006),

— in 2007, SEA Handling recorded a total loss of EUR 59 724 727 (1 January 2007-31 December 2007),

— in 2008, SEA Handling recorded a total loss of EUR 52 387 811 (1 January 2008-31 December 2008),

— in 2009, SEA Handling recorded a total loss of EUR 29,7 million (1 January 2009-31 December 2009),

— in 2010, SEA Handling recorded a total loss of EUR 13,4 million (1 January 2010-31 December 2010).

(31) Between 2002 and 2010 SEA Handling's total losses amounted to EUR 339,784 million; in response, SEA transferred a total of EUR 359,644 million to SEA Handling in the form of capital increases made in various instalments each year. The distribution and the amounts shown in the table are taken from information submitted by the Italian authorities.

(EUR thousand)

Year	2002	2003	2004	2005	2006	2007	2008	2009	2010	
Amounts injected ([1])	18 765 21 200	24 879 24 252	25 236 30 000	6 111 30 000 4 118	30 000 439 30 000	11 559 2 663 3 527 23 808	25 271	13 481 34 328	0	
Annual total	39 965	49 132	55 236	40 229	60 439	41 559	25 271	47 810	0	
Grand total										**359 664**

([1]) The capital increases intended to offset the operating losses were not necessarily all made over the course of a given year. For example, the first capital increase, of EUR 24,879 million, which occurred in 2003, resulted from the partial coverage of the losses suffered in 2002. The second capital increase, of EUR 24,252 million, resulted from the partial coverage of losses suffered in 2003.

2.3. *ROLE OF THE PUBLIC AUTHORITIES IN THE MANAGEMENT OF SEA AND SEA HANDLING*

(32) According to the information provided to the Commission, the administration of the Municipality of Milan, SEA and trade union organisations reached an agreement on 26 March 2002 which states:

The administration of the Municipality of Milan … confirms that …

— SEA will retain the majority share in the handling company for at least five years,

— SEA undertakes to report the choice of any partners to the union organisations and to present together with them the business plan and corporate structure … the agreement to be reached between SEA and the union organisations will come into effect after the business plan has been presented to and examined by the unions,

— the agreed mobility plan must resolve potential job losses, excluding collective redundancy procedures and obliging SEA to provide supplementary training, retraining, voluntary redundancy incentives and assistance pending pensionability to all identified personnel,

— the transfer of workers to the new company will take place with the protection of all rights acquired and with a guarantee of employment for the subsequent five years,

— the balancing of costs/turnover and the general economic framework will be supported by SEA and any partners, maintaining its managerial capacities unchanged while making substantial further improvements in its ability to compete properly on domestic and international markets,

— the competent Ministries and airport authorities will be approached with the aim of introducing directives which ensure guaranteed employment in the event of the transfer of ground handling activities to a competitor, with a view among other things to responding to the obligations of safety and reliability imposed on airport managers, obligations which must also extend to the staff who operate in ground handling activities.

Finally, the municipal administration and union organisations will monitor the content of this agreement, ensuring its continued implementation at regular meetings.

(33) The abovementioned commitments were confirmed by subsequent agreements which specifically reaffirmed the content of the agreement. The Commission makes particular reference to the records of the union agreements between SEA and the union organisations dated 4 April 2002, 15 May 2002 and 9 June 2003, copies of which were sent to the Commission.

(34) The Municipal Council minutes also list among the commitments entered into by the Municipality 'protection of rights' and 'guaranteed employment for the next five years' ([11]). Those commitments were reaffirmed at the Municipal Council meeting held on 16 June 2003, a copy of the minutes of which was sent to the Commission.

(35) Moreover, on 7 November 2006, the municipal councillors expressed concern regarding the crisis situation, emphasising the need to guarantee the economic survival of SEA Handling at all costs:

> The difficulties faced by SEA Handling SpA … cannot fall entirely on the backs of the workers … In light of this situation, the airport company chairman and mayor Moratti must appear before the Committee on Transport [of the Municipality of Milan] as soon as possible to explain how they intend to relaunch the role of SEA Handling SpA on the air support services market ([12]).

2.4. *ECONOMIC PERFORMANCE OF SEA HANDLING* ([13])

(36) The following graph shows the progression of operating costs and gross operating margin for the period 2002-2010. The same data are shown in table 1 below, with the progression of the turnover of SEA Handling, along with the progression of gross operating margin/turnover and labour cost/turnover ratios.

Graph 1

Economic progression of the company

[…].

Table 1

Progression of turnover and operating costs

	2002	2003	2004	2005	2006	2007	2008	2009	2010
Turnover (EUR million)	[…].	[…].	[…].	[…].	[…].	[…].	[…].	[…].	[…].
Turnover progression (YoY)		[…].	[…].	[…].	[…].	[…].	[…].	[…].	[…].
Labour costs	[…].	[…].	[…].	[…].	[…].	[…].	[…].	[…].	[…].
Cost of labour progression (YoY)		[…].	[…].	[…].	[…].	[…].	[…].	[…].	[…].

([11]) Agreement was reached on 26 March 2002 between the unions, SEA and the Municipality of Milan.
([12]) Press release from Milan municipal councillor Marco Cormio, dated 7 November 2006, a copy of which was sent to the Commission.
([13]) The data shown in the tables and graphs in this section are taken from documentation provided by SEA.

	2002	2003	2004	2005	2006	2007	2008	2009	2010
Other costs	[…].	[…].	[…].	[…].	[…].	[…].	[…].	[…].	[…].
Other costs progression (YoY)		[…].	[…].	[…].	[…].	[…].	[…].	[…].	[…].
Gross operating margin (EBITDA)	[…].	[…].	[…].	[…].	[…].	[…].	[…].	[…].	[…].
EBITDA progression (YoY)		[…].	[…].	[…].	[…].	[…].	[…].	[…].	[…].
EBITDA/turnover ratio	[…].	[…].	[…].	[…].	[…].	[…].	[…].	[…].	[…].
Labour costs/turnover ratio	[…].	[…].	[…].	[…].	[…].	[…].	[…].	[…].	[…].

(37) The table shows that labour costs remained stable between 2002 and 2007, with slight variations, at around EUR 160 million, but then dropped sharply to just under EUR 100 million in 2010, a fall of nearly 38 % in three years. The progression of other costs follows a similar trend, with a 37 % fall in the same period.

(38) Turnover rose 10 % between 2002 and 2006. The marked decline in activity of Alitalia at Malpensa had a significant impact as of 2008, since the number of trips booked through Alitalia fell 87 % between 2007 and 2010, and the revenues generated by the presence of Alitalia consequently fell 72 %. Total turnover fell 27 % in the same period, a reduction which was offset with a rise in revenues earned from other airlines.

(39) The efforts made to reduce operating costs and limit losses after Alitalia's de-hubbing in 2008 led to a gradual improvement in the (negative) gross operating margin, which climbed from – EUR 42,5 million in 2007 to – EUR 8,5 million in 2010.

(40) The following table shows the progression of worker numbers expressed in full time equivalents (FTE).

Table 2

Progression of worker numbers

	2002	2003	2004	2005	2006	2007	2008	2009	2010
Total FTEs	3 842	3 976	3 820	3 562	3 476	3 310	2 969	2 460	2 221
of which: permanent	3 692	3 804	3 457	3 223	3 011	2 795	2 760	2 419	2 181
of which: temporary	150	172	363	338	465	515	208	40	40
operative FTEs (total FTEs + hours of overtime — layoff fund)	3 964	4 125	3 979	3 706	3 642	3 461	2 852	2 227	2 050

(41) The table shows a constant decline in the number of full-time equivalents from 2003 onward (– 44 % between 2003 and 2010), particularly among permanent FTEs.

(42) Temporary staff numbers rose considerably between 2002 and 2007, from 150 to 515 FTEs. The number of temporary staff then fell, alongside a dip in turnover resulting from the loss of Alitalia traffic and greater efforts by SEA Handling to reduce its wage bill. This effort also led, in the period in question, to a reduction of overtime hours and an increase in the layoff fund *(cassa integrazione)*, causing an even sharper fall in the number of operative FTEs.

(43) The table below shows improvements in staff productivity in terms of movements handled by the work unit and the progression of labour costs.

Table 3

Progression of staff productivity

[…]

Table 4

Labour costs

[…]

3. REASONS FOR THE INITIATION OF THE FORMAL INVESTIGATION PROCEDURE

(44) In the opening decision the Commission judged, on the basis of information provided by the complainant and by the Italian authorities, that the measures for the period 2002-2005 might have constituted State aid, and expressed doubts regarding the compatibility of such aid with the internal market. In the opening decision the Commission therefore asked Italy to provide the necessary documents, information and data up to the most recent period to enable it to evaluate the compatibility of the measures. It also indicated the need to examine the period after 2005, in which the scale of the losses had not initially been communicated to the Commission, and the period 2002-2010 as a whole, in order to determine whether SEA Handling had received unlawful State aid during that period in the form of compensation for losses ([14]).

(45) The Commission reached the conclusion that there was indeed State aid, as it considered that the conditions in Article 107(1) of the TFEU were satisfied.

(46) The Commission took the preliminary view that, in consideration of the majority share of the Municipality and of the Province of Milan in SEA's capital, the funds used to cover the losses were of public origin. The Commission also observed that there was considerable evidence of the kind referred to in the *Stardust Marine* judgment ([15]) indicating an involvement of the public authorities in measures adopted by SEA with regard to its subsidiary SEA Handling.

(47) The Commission considered that the measures were selective, since they concerned only SEA Handling, giving the company an economic advantage which it would not have had under normal market conditions.

(48) To determine whether, in covering SEA Handling's losses, SEA had acted as a prudent investor operating in normal market conditions, the Commission took various factors into consideration.

(49) In a preliminary phase, the Commission found that the business plan approved in 2001 envisaged that SEA Handling would see its profits grow by 2005 ([16]). It had been said that the decision to continue operating in the ground handling sector after 2002, and not to sell SEA Handling immediately after the break-up of the two companies, was justified by the predicted upturn in profits within a three-year period. However, the 2001 business plan did not contain a detailed strategy that would allow SEA to guarantee that SEA Handling would be profitable, and that plan covered all of SEA's activities. No other detailed business plan relating specifically to SEA Handling was submitted to the Commission.

(50) The Commission also found that between 2003 and 2005, SEA Handling saw limited progress or even negative results, with annual losses exceeding EUR 40 million, while labour costs remained stable, total costs fell by around 3 %, turnover dropped 4,5 % and costs per unit of labour rose 7,6 %.

(51) The Italian authorities had argued that the coverage of SEA Handling's losses had to be looked at from a group perspective; the Commission took the view that this did not explain why, at the group level, it should have been regarded as more advantageous to cover the losses of SEA Handling rather than to sell or restructure it. The Commission considered that the deficit situation of SEA Handling was too protracted to fall within the meaning of the term 'a limited period' in the judgment of the Court of Justice in Case C-303/88 *Italy* v *Commission* ([17]) and that the recurrent nature of the coverage of losses since 2002 confirmed that SEA was not operating as a prudent investor.

([14]) Opening decision, paragraphs 42 and 102 and Section 5.
([15]) Case C-482/99 France v Commission [2002] ECR I-4397.
([16]) 'Piano aziendale consolidato del Gruppo SEA 2002-2006' (SEA Group consolidated business plan 2002-2006), provided by the Italian authorities.
([17]) Case C-303/88 Italy v Commission [1991] ECR I-1433.

(52) The Commission found that […] or other operators would have been able to enter the market; that the loss of image that the Italian authorities had invoked to justify SEA's withdrawal from ground handling was not quantified, and was presented in terms that were too vague; and that the obligation to provide ground handling services did not require SEA to provide such services direct, given that the presence of other providers constituted a practical and valid alternative.

(53) Finally, the Commission judged that the measures undoubtedly had an impact on trade between Member States and on competition. The effect on trade was clear, given the objectives of Directive 96/67/EC, which regulated access to the ground handling market at Community airports that reached the levels of traffic that the Directive specified. There was also a presumed impact on competition, since the measures significantly strengthened the position of SEA Handling to the detriment of its competitors.

(54) The Commission considered for the time being that the coverage of losses constituted State aid, and expressed doubts regarding the compatibility of the aid in question with the internal market. The Commission communication 'Community guidelines on financing of airports and start-up aid to airlines departing from regional airports' ('the Aviation Sector Guidelines') ([18]), referring to Directive 96/67/EC, states that Above the threshold of two million passengers, ground-handling services must be self-financing and must not be cross-subsidised by the airport's other commercial revenue or by public resources granted to it as airport authority or operator of a service of general economic interest ([19]). The Commission found that the subsidising of such activities by public authorities was contrary to the objectives established by Directive 96/67/EC and could therefore have a negative effect on the liberalisation of the market.

(55) Consequently, the Commission decided to initiate the formal investigation procedure to remove all doubts as to the classification of the measures as State aid up to the most recent period, and as to their compatibility with the internal market.

4. OBSERVATIONS OF THE ITALIAN AUTHORITIES

The period under investigation

(56) The Italian authorities were puzzled by the decision primarily because of the chronology of the claims made by the Commission. The Italian authorities argued that the observations of the Commission referred to the period 2006-2008, which was later than the period that formed the basis of the preliminary investigation and, therefore, of the requests for clarification that they had received regarding the period 2002-2005. The Municipality therefore asked the Commission to amend the timeframe covered by the proceedings, and to send the Italian authorities a regular request for information for the later period (from 2006 onwards) ([20]).

The imputability to the public authorities of the measures for the coverage of losses

(57) The first indication of imputability identified by the Commission consisted of excerpts from the agreement of 26 March 2002 signed by the Municipality of Milan, SEA and union representatives, excerpts from the record of the union agreement of 4 April 2002, subsequently confirmed on 15 May 2002, between SEA and the industrial and confederated union organisations, and excerpts from the minutes of the union agreement concluded by SEA, SEA Handling and the industrial and confederated union organisations of 9 June 2003; the Italian authorities asked the Commission to reconsider the probative value of these documents.

(58) In this regard, the Italian authorities argued that the measures could be imputed to the State only on the basis of objective findings showing that the Member State had intervened in SEA's decision in such a way as to determine or influence it, in the sense that SEA would have adopted different behaviour had it been able to make an independent decision ([21]); they contended that this was not the case for the Municipality of Milan.

(59) The Municipality argued that it had had no involvement whatsoever in the signing of the union agreements, and had had nothing to do with the commitments given by SEA to union representatives in the agreements in question. The Municipality had participated only in the meeting of 26 March 2002, and had protected the interests of workers as the majority shareholder and particularly as the responsible authority in the local community. As such it had not entered into any commitment, but had given the unions 'confirmation' at political level of SEA's business decisions,

([18]) OJ C 312, 9.12.2005, p. 1.
([19]) Aviation Sector Guidelines, point 70.
([20]) Following this observation, the Commission, in its letter of 11 July 2011, drew attention to paragraph 42 of the opening decision, which stated that the Commission judged it necessary to examine the period 2002-2010 to determine whether SEA Handling had received unlawful State aid in the form of compensation for losses during that period. The Commission went on to confirm that the time being considered ran from 2002 to the most recent period, and that the requests for information remained valid.
([21]) Judgment of the General Court in Case T-442/03 *SIC* v *Commission*, paragraph 126.

and in particular its strategy of saving jobs, with the intention of supporting the unions in overseeing the implementation of those decisions. The agreement, which was clearly of a socio-political nature, had no value in law, and served only to reassure the unions as to the trustworthiness of SEA's commitments. From the documents taken into consideration by the Commission, it could not be inferred that the Municipality of Milan had played a determining role in the decision to cover SEA Handling's losses, or that it had assumed any obligation in that respect. SEA therefore took its own business decisions in complete freedom and independence.

(60) In general, the correspondence from 2002 to 2005 between company management and certain members of the Municipal Council, who were denied access to certain SEA internal documents which they had requested, in particular the business plan, provided proof of a lack of interference by the administration in the activities of SEA. According to the Italian authorities, there was additional proof in the fact that SEA had specifically asserted its independence from the administration, for example in response to a question submitted by a municipal councillor.

(61) The Italian authorities also stated that the Municipality could not legitimately enter into valid and effective commitments without formal acts adopted by its competent bodies giving specific indications of financial coverage.

(62) The second indication of imputability identified by the Commission was the particular dependency of the directors and managers of SEA on the Municipality of Milan: here the Italian authorities disputed the Commission's elevation of claims made in newspaper articles to the level of evidence. They also put forward the following observations.

(63) First, regarding the SEA directors' signing of 'blank resignations' that were submitted to the mayor of Milan before the end of their term of office, the Italian authorities maintained that such resignations did not show the existence of a situation of particular dependency of SEA directors on the Municipality. As acknowledged by the chairman of the board of directors at the ordinary meeting held on 24 February 2006, this was a common practice 'used specifically to take timely steps to remove directors alleged to have acted improperly'. The chairman ruled out the use of such letters in cases where the shareholder disagreed with managerial decisions made by the board of directors: the board had exclusive responsibility for such decisions. He stressed that 'in any case, nobody has ever applied any pressure with reference to this letter or to other documents', and that such letters had 'moral value, but no legal value'. According to the representative of the Municipality at the same SEA ordinary meeting, such letters 'would be entirely unlikely to influence the conduct of board members. The members of the board are subject only to the general meeting of shareholders: only by that body can they be appointed and dismissed, and only to that body are they responsible for company management'. According to the Italian authorities, the only effect of the abovementioned letters was that a director dismissed by the shareholders' meeting would lose entitlement to compensation for unfair dismissal.

(64) Second, still with regard to the relationship of particular dependency of SEA on the Municipality of Milan, the Italian authorities observed, contrary to the claims of the Commission, that in its supervisory role the Municipality of Milan did not appoint representatives to the board of directors, but merely designated them: board members were appointed only by the general meeting, in accordance with the ordinary rules of private law governing limited companies under the Italian Civil Code. They also argued that in line with the ordinary legal rules, as was often the case, the constitution of SEA gave the board of directors the power to select the names of directors to be submitted for the meeting's approval.

(65) The Italian authorities affirmed that other indicators that might tend to demonstrate the imputability of a State measure, and in particular the classes of evidence identified by the Court of Justice in the *Stardust Marine* case, likewise led to the conclusion that the measure under examination in this case was not imputable to the State. SEA was not integrated into the structures of the public administration in any way, either locally or at the national level. Turning to the nature of its activities and the exercise of the latter on the market in normal conditions of competition with private operators, the Italian authorities stated that SEA always acted as an ordinary private firm. The legal status of the undertaking could not demonstrate that the measures were imputable to the State either, because SEA was in every respect a private company. Finally, in reference to the last kind of evidence identified by the court, namely the intensity of the supervision exercised by the public authorities over the management of the undertaking, they contended that the Municipality exercised no influence whatsoever and that the company had itself proclaimed its independence from the administration, which demonstrated that the administration was not involved in the adoption of any corporate decisions.

Application of the private investor test

(66) With regard to the application of the private investor test, the Italian authorities argued that the factual evidence (economic and other data) which the Commission had assembled during the course of its preliminary investigations, but which related to a time after the disputed acts were decided, could be used where necessary to evaluate the compatibility of the measures with the rules of the Treaty, if they were classified as aid; but such evidence was of no help in determining whether the financial measures in question were compatible with the private investor test. The Commission's entire reasoning was vitiated by an erroneous application of the private investor test, which derived from an inaccurate assessment of the background to the case.

(67) With regard to the context that had to be taken into consideration, the Italian authorities observed, first, that the Commission had taken no account of the fact that, as part of the liberalisation of the European ground handling services market following the adoption of Directive 96/67/EC, transposed into Italian legislation by Legislative Decree No 18/99, SEA had decided not simply to separate its accounts, but to spin off the activities in question and transfer them to a new legal entity. This break-up was instrumental in the group's strategic aims of finding an industrial partner to provide ground handling services and identifying measures to improve the efficiency of ground handling services at Linate and Malpensa airports.

(68) According to the Italian authorities, as part of the liberalisation process, airport management companies had generally reorganised ground handling services after having considered the two viable commercial models: ground handling services might be provided not directly by the airport manager but instead by outside companies operating on an international scale ('outsourcing', e.g. airports in London, Copenhagen, Spain or Dublin), or they might be provided directly by the airport manager with only the accounts being separated (e.g. Frankfurt or Vienna) or through the formation of a separate company (SEA or Paris) ('direct management'). Each of the two models had its advantages and disadvantages, which the airport management companies had looked at carefully, particularly given the different regulatory circumstances in each country. Outsourcing allowed resources to be focused on core business, and benefited the profit and loss account immediately, because in most cases ground handling services operated at a loss, unless they were provided on a large scale and not only at the airport managed by the company. But keeping ground handling activities allowed airport managers to exercise greater control over the quality of the service, which, leaving the regulatory aspects aside, had knock-on benefits on group profits, particularly in the medium to long term.

(69) This second model, which had been chosen by SEA, enabled the airport manager to protect the role of the airport centre and the transfer processes, to retain control over the level of quality of the service provided, to provide select ground handling services at airports in which no other operators were able to supply them and, finally, to maintain a strong influence over airport security. This option necessitated high operating costs which were inherent in the direct provision of ground handling services. Productivity in this area could not be measured in exclusively financial terms.

(70) The Italian authorities argued that this strategy of the SEA group was perfectly rational, because it enabled SEA to retain ground handling services, counting on a gradual increase in productivity and on the quality of services and medium- to long-term benefits to the group. At the same time, by spinning off the activities and transferring the provision of services to a separate company (SEA Handling), SEA would be able to capitalise on any opportunities for partnership with other operators in the sector, with the aim of recovering profitability thanks to the synergies achieved through integration into an international network and the acquisition of further operational know-how.

(71) SEA, therefore, intended to bear the losses initially recorded by its subsidiary with a view to the benefits that would ensue for the group, along with a gradual improvement in SEA Handling's revenue and profitability (which was initially forecast to happen after three years of activity, i.e. by 2005), to be achieved through measures set out in a restructuring plan which also provided, if possible, for the entry of a strategic partner which would acquire a significant minority share in SEA Handling.

(72) In May 2001, SEA launched a competitive bidding procedure aimed at identifying a minority strategic partner in SEA Handling, at the end of which the offer submitted by […] was found to be the most advantageous. The negotiations undertaken with […] came very close to signature, particularly thanks to a relaunch plan. But thereafter the negotiations ran aground, owing mainly to disagreement over the valuation of the company.

(73) The measures set forth in the SEA group's consolidated business plan for 2002-2006 ('the 2002-2006 consolidated business plan') focused on a recovery of labour productivity of 20 % in that period. These measures were judged appropriate and sufficient to validate the choice of business model that had been made. While the objective for the recovery of profitability was not met, the financial results were encouraging, and confirmed SEA's view of the suitability of the business model chosen, in the economic interests of the group and its shareholders.

(74) The Italian authorities argued that the fact that SEA Handling saw no recovery in profitability within the term initially proposed was due to a market scenario that differed greatly from what had been forecast, as a result of two international factors which significantly affected the development of air traffic in that period, namely SARS and the Iraq war, and the consequent economic challenges faced by international airlines, which suffered a sharp rise in oil prices and consequently had to accept a drop in prices in a competitive environment that was far more aggressive than expected.

(75) The Italian authorities asked the Commission to reconsider its objection to SEA's decision to continue to cover the losses of its subsidiary even when, in its view, economic developments in its first two full years of activity (2003 and 2004) showed that an upturn in profitability within three years would be impossible. The Italian authorities argued that this objection was based on a simplistic application of the private investor test, essentially in terms of mere short-term profit. The Commission had overlooked the fact that, in the case in point, there were other factors be taken into account, in addition to the financial flows generated directly by the investment, especially because the parent company was vertically connected to its subsidiary, and that an appreciable part of its business depended on the quality of the services the subsidiary provided. The Commission had confined itself to looking at the lack of profitability of the measure in first two years of operation, and had completely ignored the specific nature of the sector, in which an airport manager might have an interest in carrying on a ground handling business, or supporting it financially, irrespective of its immediate profitability.

(76) The Italian authorities also provided a counterfactual analysis conducted by an external consultant with the aim of proving that the hypotheses behind the document supplied by SEA, 'Presentazione del piano aziendale 2003-2007 di SEA Handling' (Presentation of the SEA Handling 2003-2007 business plan, hereinafter 'the 2003-2007 business plan') were realistic and reasonable, and that a number of unforeseen circumstances had had serious negative effects on SEA Handling, resulting in losses greater than those reasonably foreseeable when the decision to cover the losses was made. The primary finding of this analysis was that the main reason that the results recorded fell short of those forecast in the business plan was the fall in traffic handled and in prices. In other words, while SEA Handling had managed to achieve its objectives in terms of reducing unit costs, it had not reached the financial targets set in the business plan owing to the significant loss of revenue due to the drop in traffic and in prices by comparison with the levels forecast.

(77) The Commission had also failed to give proper consideration to the specific character of the sector in Italy in light of the applicable Italian regulations. First, pursuant to Article 3.3 of Legislative Decree No 18/99 and Article 705.2(d) of the Sea and Air Navigation Code, the airport manager was required to ensure that the airport had all the necessary ground handling services, either providing them directly or coordinating the activities of operators who provided such services themselves or through outside parties. Additionally, with specific reference to Linate and Malpensa airports, Article 4 of the agreement signed between ENAC (the Italian Civil Aviation Authority) and SEA on 4 September 2001 specifically required SEA to guarantee ground handling services and to ensure the availability and efficiency of all vehicles, equipment and systems and anything else necessary for the continued, regular and effective provision of such services.

(78) The Italian authorities argued that this legislation did not allow SEA simply to transfer or outsource ground handling activities. Even if it were to decide to move in that direction, it would still have to conclude the appropriate contracts and bear the necessary costs in order to satisfy itself that the services met the demands and requirements imposed by the legislation or deriving from provisions laid down in the measure entrusting it with the management of the airport. The airport manager continued to be responsible to the public authority for the regular and effective provision of ground handling services.

(79) For the correct application of the private investor test to the case, lastly, the Italian authorities observed that according to established case-law, the private operator with which the conduct of the public enterprise was to be compared must be of a comparable size and nature ([22]), and that the investment consisting of the coverage of the losses of SEA Handling was decided and carried out by the SEA Group, shareholder in SEA Handling and holder of the concession for the management of Malpensa and Linate airports. First, this meant, as the Commission had indeed pointed out in its decision, that the conduct of SEA could not be compared to that of an ordinary investor laying out

([22]) Judgment of the General Court in Case T-296/97 *Alitalia*, paragraph 81.

capital with a view to realising a profit in the relatively short term, but instead had to be compared to the conduct of a private holding company or a private group of undertakings pursuing a structural policy — whether general or sectoral — and guided by prospects of profitability in the longer term ([23]). Second, consideration must also be given to the specific features of the regulated sector in question, and to the normal dynamics, in that context, of the economic relations between the parent and the subsidiary ([24]).

(80) Consequently, the Italian authorities considered that the Commission should have evaluated the measures in question from a group perspective, that is, examining SEA's consolidated balance sheet; if it had done so, it would have found that the group had received substantial gross revenue, and had been well able to absorb the losses of its ground handling division internally while creating value for its shareholders.

(81) Besides the probability of deriving indirect material profit from the coverage of SEA Handling's losses, there were other considerations to be taken into account, including: (a) the possibility of obtaining indirect economic advantages from commercial relations with the subsidiary; (b) the difficulties of outsourcing in the national context of reference, given the economic obligations undertaken and the commitments made to the public authorities; (c) the protection of the image of the group; and (d) the fulfilment of obligations towards the state deriving from the agreement and from the law.

(82) In the three-year period of 2003-2005, the SEA group had achieved significant results with regard to the quality of the service provided to users. Waiting times for arriving baggage had improved and calls managed by SEA had seen their punctuality improve.

(83) In conclusion, the Italian authorities considered that SEA's conduct in the case was perfectly compatible with that of a private business group which was pursuing a structural policy and which preferred to compensate the losses of one of its business divisions for the present, with a view to improving long-term profitability and in consideration of other factors of a financial or non-financial nature that were inherent to the group's economic interests. Contrary to the Commission's arguments, therefore, the existence of solid prospects for a return to profitability within a reasonable time was demonstrated by the constant economic improvement seen by SEA Handling in the period 2003-2005, despite its inability to find a strategic minority partner and despite the difficult market situation.

Compatibility

(84) Regarding the admissibility of the measures, the Italian authorities essentially made the following claims: (i) considering the constant losses recorded by its ground handling divisions, even prior to the formation of SEA Handling, it was clear that the company had been in difficulty since the date it went into operation; (ii) the restructuring of SEA Handling was based on a restructuring plan consisting of various documents regarding the period 2003-2010, aimed at restoring the profitability of its ground handling business; (iii) those documents set out in detail SEA's strategy and the schedule of measures to be taken.

(85) More specifically, the 2002-2006 consolidated business plan laid down the following measures for recovering ground handling productivity and increasing revenue:

— incentives for reducing the employee absentee rate;

— computerisation and rationalisation of operating branch activities;

— allowing overtime;

— integration of Malpensa airport sectors A and B as of January 2002;

— introduction of new employment contracts with flexible hours; and

— measures aimed at reducing staff transfer times.

(86) Additionally, the Italian authorities argued that one of the most important restructuring measures was the selection of a minority shareholder.

([23]) Judgment of the Court of Justice in Case C-305/89 *ALFA Romeo*, paragraph 20.
([24]) Judgment of the Court of Justice in Joined Cases C-83/01, C-93/01 and C-94/01 *Chronopost*, paragraphs 33-38.

(87) Second, according to the Italian authorities, the 2003-2007 business plan, which was centred on SEA Handling, identified the main factors having negative effects on the functioning of the company: it cited in particular the cost of labour, organisational imbalances, and insufficient technological innovation. The document indicated the principal measures needed to restore company productivity: (i) increase of the company's market share; (ii) measures to increase technological innovation; (iii) measures to improve adaptability to customer needs; (iv) review of non-core activities with high costs; (v) reduction of labour costs; (vi) recovery of revenue from activities other than ground handling services.

(88) Third, the Italian authorities observed that the document 'Executive Summary — Linee guida del piano strategico 2007-2012 del gruppo SEA — 11 maggio 2007' (Executive Summary: Guidelines for the SEA group's 2007-2012 strategic plan, 11 May 2007, hereinafter 'the 2007-2012 strategic plan') included a three-phase plan aimed at returning SEA Handling to viability by 2011. The aim of returning its ground handling business to profitability was also apparent in the SEA group strategic plan for 2009-2016 ('the 2009-2016 strategic plan') and in the SEA group business plan for 2011-2013 ('the 2011-2013 business plan').

(89) Fourth, the Italian authorities argued that there was no distortion of competition, since the measures in question were necessary for liberalising the market. In any event measures had been taken to ensure that competition was not unduly distorted, most notably the gradual reduction in employment levels (with 1 755 jobs cut in 2003-2010) and reduced market presence (a complete withdrawal from all non-core business; the ending of de-icing activity; and the failed attempts to sell a minority share in SEA Handling).

(90) Finally, Italy contended that the aid was clearly limited to the minimum necessary, given the operating losses sustained by the company and the amount needed to ensure continuity of ground handling operations. The aid did not result in an increase in the company's market share to the detriment of its competitors, since no investment measures were taken that were not included in the restructuring plans.

5. OBSERVATIONS OF THE INTERESTED PARTIES

5.1. *SEA*

(91) In its observations, SEA supported the arguments presented by the Italian authorities, and elaborated on certain aspects.

The imputability to the Italian State of the measures for the coverage of losses

(92) The Commission had asserted that the Municipality had played an active role in the union agreement of 4 April 2002; SEA began by looking more closely at the *Stardust Marine* judgment, arguing that the burden of proof with regard to imputability lay with the Commission, and asserting that the evidence provided in the case was limited in volume and was flimsy in content and consistency. There was far more solid and meaningful counterevidence to show that SEA had made its choices with regard to the restructuring of SEA Handling independently.

(93) The agreements reached with the union organisations were aimed at reassuring employees that their rights would be safeguarded and that the employment protection measures based on the strategy adopted by SEA would be implemented. SEA's board of directors had decided to reorganise the group, but had not given any commitment that in the course of the reorganisation staff numbers would not be cut in the light of market demands. All decisions to cut or restructure the business up to the present day were based entirely on economic considerations, and the Municipality and the political forces that were represented there had played no significant role.

(94) Social concerns were clearly reflected both in Legislative Decree 18/99, Article 14 of which was concerned with 'social protection', and in Directive 96/67/EC, which acknowledged that Member States 'must retain the power to ensure an adequate level of social protection for the staff of undertakings providing ground handling services' (recital 24), and went on to authorise Member States to take the necessary measures to ensure protection of the rights of workers, without prejudice to the application of the Directive and 'subject to the other provisions of Community law'. SEA had taken its business decisions freely, and social concerns had played a role only within the limits imposed by the legislation.

(95) Moreover, the Commission had ignored certain counterevidence suggested by the Municipality of Milan, namely the fact that the commitments allegedly given in the union agreement of 26 March 2002 had never been applied, and the limited duration of those commitments.

(96) The Commission alleged that the Municipality exercised supervision; SEA stated that it had full decision-making and managerial independence, and that it exercised that independence freely, without any influence being brought to bear by the Municipality or the Province of Milan. Corporate management was the exclusive responsibility of the directors, and outside entities (e.g. controlling shareholders) could not exercise the powers and functions of directors. Even if it were to be supposed, purely for the sake of argument, that the majority public shareholder could ordinarily exercise effective influence over the decisions of the SEA's governing bodies, the crucial consideration in order to show that there was imputability for purposes of the *Stardust Marine* judgment was not the organisational structure but actual interference in the disputed decisions.

(97) According to SEA, the Commission had to take greater account of the contrasting positions which emerged at the meeting of the Milan Municipal Council on 16 June 2003, the minutes of which unequivocally demonstrated the company's decision-making and managerial autonomy, on the one hand when the municipal councillors acknowledged SEA's refusal to provide classified information that was being discussed in negotiations with union organisations, and on the other in light of the rejection of a motion calling on the Municipal Executive to ask SEA to present a business plan: not only would this motion have been approved, but there would never have been any need to put it forward, had the Municipality of Milan actually exercised or had it been aware that it could exercise the influence which the Commission seemed to want to attribute to it.

(98) Concerning the 'blank resignations', SEA added to the statements made by the Municipality of Milan that at the SEA general meeting on 24 February 2006, the chairman of the SEA board of auditors had confirmed that none of the members of the board had been asked to sign such letters. All the answers given at that meeting with regard to blank resignations were clear evidence against the theory that there was a relationship of particular dependency on the Municipality of Milan. Moreover, as affirmed by SEA's chairman at the same meeting, the board of directors did not comply with the shareholder's request that a dividend of between EUR 250 million and EUR 280 million should be distributed, and instead set the amount available at EUR 200 million, thus taking a decision against the wishes of the Municipality and showing that the company had not been influenced by the existence of these letters.

(99) Finally, the accusations that SEA's board of directors was dependent on the Municipality of Milan, which had been reported in the media, dated from 2006, and proved nothing with regard to influence exercised by the Municipality over SEA before that year. There were in fact no grounds to suppose that any such influence existed, if the Commission could not produce solid evidence to that effect that took account of the sequence of events.

Application of the private investor test

(100) SEA recalled that in *ALFA Romeo* ([25]) and *ENI-Lanerossi* ([26]) the Court of Justice had held that just as a private shareholder might reasonably subscribe the capital necessary to secure the survival of a company which was experiencing temporary difficulties but was capable of becoming profitable again, possibly after a reorganisation, so might a parent company decide to bear the losses of one of its subsidiaries for reasons other than the pursuit of a short-term return on investment. In *ENI-Lanerossi,* the Court indicated that in the eyes of a private investor pursuing an objective of long-term profitability (not merely financial), a transfer of capital to a loss-making subsidiary might be justified by considerations such as the likelihood of an indirect material profit from the investment, the prospect of disposing of the subsidiary on better terms, or the desire to protect the group's image or to redirect its activities.

(101) In the case in point, SEA considered that in the eyes of a private investor the compensation of SEA Handling's losses might be validly justified not only by the presence of a strategic plan and restructuring programme with good long-term profit prospects, but also by considerations other than a mere financial return on investment, considerations that derived from the special responsibility incumbent upon SEA as airport manager and from its image, bearing in mind that at no time did the internal compensation impose any specific debt or financial burden on the group, which was in fact generating a significant net profit.

(102) Additionally, SEA stated that its investment decisions were based not necessarily on considerations of immediate profit, such as might guide the decisions, possibly speculative, of a minority shareholder without powers of control, or of a controlling shareholder driven exclusively by a desire to secure maximum profit from ground handling support services seen in isolation, but rather on far broader considerations directed towards the objective of maximising the overall long-term profits of the SEA group.

([25]) Case C-305/89 Italy v Commission [1991] ECR I-1603, paragraph 20.
([26]) Case C-303/88 Italy v Commission [1991] ECR I-1433, paragraph 21.

The context of the measures

(103) SEA submitted that the Commission could not neglect to consider the regulatory context in which the compensation of losses took place. The regulatory framework generated the competitive pressure under which SEA operated and the obligations by which it was bound, and had an impact on its industrial decisions and on the results obtained as a result of such decisions. However, since the contested measures were implemented in the period immediately after the adoption of Directive 96/67/EC, which sought to liberalise the sector, and its transposal at domestic level, SEA pointed out that from 1996 it had allowed an outside provider of ground handling services (ATA Handling) in its airports.

(104) It also pointed out that Italy had opted for a complete liberalisation of the ground handling services market, the only proviso being that the supervisory authority ENAC was entitled to impose temporary restrictions on the number of service providers provided it had proper grounds. ENAC had certified 246 providers, 84 of which were authorised to operate at Linate and Malpensa, and SEA considered that ENAC had thereby congested the ground handling services market at certain Italian airports. The option chosen by Italy favoured the entry of numerous operators, but the market trend was towards a reduction in the number of ground handling service providers operating at each airport. This was confirmed by the rules recently approved by ENAC, which introduced requirements stricter than those previously applying to the certification of providers of such services, in order to ensure more careful selection of operators, who would then be expected to guarantee services with higher levels of quality and security. SEA argued that the choices made in other European countries went in the opposite direction, in order to avoid excessive competitive pressure and thus an imbalance in the economic conditions of providers due to pressure exerted on their prices.

(105) In a developing competitive context, SEA stated that the decision to split the company was taken in the light of its strategic commercial model, which at that time was based on the use of Malpensa airport as a hub, with a need for control, monitoring and management of ground handling services (following a model similar to those at Frankfurt and Vienna airports).

(106) SEA insisted that in analysing the economic logic of its decisions, consideration had to be given to the nature of the ground handling services market. First, the ground handling business had a very low profit margin, a factor amplified by the liberalisation of the market: profitability was poor when the service was not actually provided at a loss. The operators that found it easiest to make a profit, if only a modest one, were usually those that had a network, oftentimes international, through which they were able to distribute business risk across various sites of operation. For example, a presence at multiple airports enabled the operator to offset costs incurred in countries that had stricter regulatory or contractual requirements concerning workforce management against lower costs incurred in countries where the rules were more flexible. The operators that managed to obtain positive margins overall were those that had an international network and achieved substantial synergies through exclusive global contracts, a single, centralised administration, economies of scale in their investments, market shares that were small but often linked to one reference carrier or specific working hours, and economies of scale achieved by serving a particular carrier in multiple airports.

(107) The market was heterogeneous from a supply perspective as ground handling services could be provided by entities of different types, capacities, responsibilities and areas of activity: airport managers with separate accounts, airport managers with separate business structures, outside service providers (which in turn could be divided into domestic or international networks and SMEs), or airlines which provided their own ground handling services.

(108) The Commission consequently must not fail to consider the functioning and general development of the ground handling market and to compare the progression of SEA Handling with that of comparable operators. From the point of view of the general development of the market, given that profit margins were very low, SEA considered that coming from a situation of severe deficit in terms of productivity of the business division, and a wide imbalance in terms of its cost structure, with a particularly difficult market situation and general economic climate, a gain in profitability could not be miraculous or sudden, and an extension of the timeframe initially established would be anything but surprising.

(109) SEA therefore contested the argument that given the impossibility of absorbing SEA Handling's losses within the forecast three-year period, SEA should have revised its strategy and detached itself from its ground handling division. SEA stresses that it could not reopen discussion of its decisions every year: ground handling, like all airport-related economic sectors, reckoned in periods of years, and the validity of decisions could be properly evaluated only over the long term.

(110) Regarding the comparison of the economic performance of SEA Handling with those of other operators, SEA suggested that a truly comparable operator had to be an airport manager providing ground handling services through a separate company, and the only such operator was […]. In the period 2004-2006, […] had reported losses in its ground handling business, and the negative results had continued in subsequent years and seemed destined to continue in the near future.

(111) Given its commercial model as a hub, SEA had to have an operator which was capable of providing all the necessary ground handling services at high quality standards. Only SEA Handling was able to meet those requirements, since none of the others on the market had the material resources, economic resources and above all staff resources needed to guarantee provision of all the services called for under this model.

(112) Leaving aside its own interests, SEA had a legal obligation, in that the national regulations held the airport manager responsible in the event of any failure in the provision of ground handling services.

(113) Moreover, the complete liberalisation of the market in Italy imposed heavier burdens on the airport manager than it would have had to bear in a market that was only partially open. The airport manager had an obligation and a responsibility towards the supervisory authority to maintain special task forces capable of ensuring continued service in case of emergencies or unforeseen events. It had no way of imposing continued service obligations on new operators, whereas such obligations could be envisaged in tender specifications used in a selection procedure as part of a partial liberalisation.

The economic rationality of SEA's conduct

(114) SEA argues that the separation and subsequent transfer of ground handling activity to a subsidiary, SEA Handing, were conducted in compliance with European Union law and with a view to engaging with liberalisation on the best possible terms, making the most of the long-term development openings it offered. The separation was intended to enable SEA to better implement the policies needed to improve the efficiency and productivity of both companies, while at the same time seizing any opportunities to secure alliances with external partners.

(115) SEA states that the spin-off of ground handling activities led to an increase in its costs, due to the obligation on it with regard to the management of emergencies and unforeseen events. By way of illustration, the savings it obtained from economies of scale deriving from its ability use the marginal cost of SEA Handling personnel for continued service, rather than incurring the cost of setting up and maintaining a specialised group, amounted to EUR 10,7 million in 2003 and EUR 8,7 million in 2010.

(116) SEA contended that from the outset SEA Handling had a very heavy cost structure, with extraordinary burdens and the specific task of gradually bringing ground handling services first to sustainability and then to profitability. From the beginning, therefore, SEA had implemented an intense restructuring and recovery programme with the aim, if possible, of identifying a strategic partner that could contribute to the pursuit of those objectives.

(117) In May 2001 SEA launched a competitive bidding procedure with a view to selecting one or more operators looking to purchase a minority share in SEA Handling — a procedure in which a large number of leading operators in the industry participated. Following an analysis of the credentials and bids of interested companies, in the same year, SEA entered into negotiations with […], which had submitted the most advantageous partnership proposal. Although the negotiations reached an advanced stage, and a plan was drawn up to re-launch SEA Handling, the SEA board of directors, at its meeting on 10 September 2002, decided not to accept the operator's bid, considering it […]. SEA acknowledged that the failure of those negotiations compromised the viability of its target to return SEA Handling to profitability within the term initially proposed, a target for which the identification of a strategic minority partner was considered an important tool.

(118) In April 2008 SEA launched a new procedure for the partial sale of SEA Handling, which has yet to reach a conclusion, despite initial interest from a leading international operator.

(119) SEA emphasised that the SEA Handling recovery program was based primarily on the hub airport commercial model chosen by the group, and had a medium/long term timeframe that would allow an adequate economic return on the financial commitments required to undertake such activity. SEA pointed out that Directive 96/67/EC stated that where the number of ground handling service providers was limited providers were to be selected, by an appropriate procedure, for seven years, implicitly acknowledging that shorter periods of time would be insufficient to achieve adequate organisational scheduling and the consequent economic return.

(120) Specifically, the program consisted of measures to improve labour productivity and gradually to reduce staff costs. These objectives were to be achieved by taking both qualitative measures, addressing the way ground handling activities were carried out, and quantitative measures, looking at staff numbers. In the first place the restructuring plan interlocked with the SEA group's 2002-2006 consolidated business plan, which outlined the group's strategy and objectives and the measures to be adopted to return its ground handling services to profitability. Thereafter, SEA Handling's 2003-2007 business plan, adopted on 29 July 2003, provided for a restructuring program aimed at improving the efficiency of all services, structures and human resources pertaining to ground handling. SEA hoped it could return its ground handling business to profitability within three years, that is, by 2005, or at the latest by 2007.

(121) SEA therefore disputed the Commission's claims that the group's consolidated business plan did not give a detailed description of the measures that SEA intended to adopt to reorganise SEA Handling, and that there was no detailed business plan specifically for SEA Handling that set out the strategy for saving the company and the steps by which the strategy was to be implemented.

(122) SEA considered that the improvement in the key economic indicators between 2003 and 2004 was encouraging and showed the validity of SEA's actions. The return to profitability by 2005 envisaged in the 2003-2007 business plan was stifled by a series of factors that had a negative impact on SEA Handling's economic situation of SEA Handling. Among these, SEA cites the spread of SARS in 2002-2003; the outbreak of the Iraq war in 2003 and the growing threat of international terrorism; intensified pressure to cut ground handling prices in 2006, following the arrival of new operators at Malpensa airport, particularly Aviapartner, which resulted in a downward revision of several contracts, including that with Alitalia (– 6 % of the unit price); the 'de-hubbing' of Milan Malpensa airport decided by Alitalia in 2007, the full effects of which were felt as of April 2008; and the ash cloud produced by the Icelandic volcano Eyjafjallajökull in 2010.

(123) In light of the worsening in SEA Handling's position in 2006-2007, and following the de-hubbing by Alitalia, SEA had to decide whether to maintain its commercial model, in which case it would have to adapt and update the programme for the relaunch of SEA Handling. SEA finally decided in 2007 to focus on creating an innovative 'self-hub' or 'virtual hub' model, and confirmed the strategic decision to continue with the recovery and restructuring of SEA Handling, reiterating the importance of ground handling services to its own industrial plans, as in the previous model. Its decision was based on the results already achieved in terms of labour productivity and staff cuts, on the fact that its past experience showed that a return to profitability was possible, and on the consideration that any other solution, including outsourcing, continued to raise the same counterindications that had been evaluated in 2003.

(124) The coverage of losses was still justified, because the use of outside operators to provide certain continued service activities was neither economically advisable (given the higher cost of outsourced services compared to the synergies that could be achieved internally) nor practicable (given the absence of outside operators able to provide a comprehensive set of ground handling services, and the poor reliability and quality of services provided on numerous occasions by the operators working at the Milan airports).

(125) As regards the practicality of the services offered by outside operators, SEA contends, first, that while the certification necessary to provide all ground handling services at Milan airports was obtained by some outside providers, such as Aviapartner, in 2006 and thereafter, the real situation was quite different. The standardised certification procedure followed by ENAC was inadequate, because it was often based on whether the ground handling provider met certain requirements stated in terms of the group as a whole, rather than the actual capacity that the company was able to guarantee at a given airport. As airport manager, SEA ought to have been involved in the ground handling service provider certification procedure, so that it did not have to suffer directly the consequences of service failures or inefficiencies on the part of outside operators, without having the power to penalise them. Under the new ENAC regulations of 19 January 2011, the airport manager was to give a reasoned opinion on the regularity of the procedure and on the standards for providers.

(126) Second, no outside operators were actually able to offer the complete set of services, since their commercial strategy consisted of focusing on the most profitable services.

(127) Third, the operators working at the airports owed a considerable amount of money to SEA Handling, which often had to intervene in emergencies to make up their shortcomings, and had finally decided to go through legal channels to recover its claims.

(128) Fourth, contrary to the statements made by the Commission, the main competitors currently operating at the Milan airports, ATA Handling and Aviapartner, had not made profits. ATA Handling had recorded losses between 2003 and 2005 which, according to SEA, were heavier at the Milan airports. Aviapartner had made profits across the network of airports in which it operated, but SEA considered it likely that the company had recorded losses on the services it provided at the Milan airports.

(129) As regards the assessment of SEA Handling's financial performance, which it had been argued might have led to a different decision, SEA stressed that in the ground handling sector the effects of business decisions could be evaluated only in the long term and that, consequently, SEA's decision could not reasonably have been changed after just a few years, particularly in light of the encouraging results obtained in the initial three years, which had had positive effects that were compromised only by events that took place thereafter outside the SEA group.

(130) As regards the accounting arrangements, SEA stated that SEA Handling's results did not receive the subsidy to ground handling services that could be given by assigning business to the subsidiary that was paid in accordance with a more profitable scale of rates, rather than at market prices, as was the case with other European operators. SEA Handling was also the only ground handling service provider in the Milan airports that regularly paid the airport manager the fee for the use of common facilities; if, like other operators working at the Milan airports, it were not to pay this fee, SEA Handling's accounts would already be in the black (in 2011). Finally, the accounts for ground handling services did not include revenues deriving from the management of centralised infrastructure, as was the case with comparable operators. The inclusion of these activities at set rates in SEA Handling's accounts would generate additional annual revenues of around EUR 70 million. SEA cited the example of […], which included in its ground handling services accounts revenues deriving from 'centralised infrastructure management', an item which did not appear on the exhaustive list of ground handling services contained in Annex A to Directive 96/67/EC, nor in the IATA Standard Ground Handling Agreement. If it had acted in the same way in the period 2005-2009 SEA would have achieved a total gross operating margin of between – EUR 9 million and + EUR 8 million (compared to an actual total of between – EUR 42,5 million and – EUR 23,2 million), which would have reduced the operating loss by an average of 100 %.

(131) SEA stated that by 2012 it would have finally returned its ground handling services to profitability, thanks to its perseverance in implementing its restructuring plan, which had proved to be prudent and consistent with the conduct that could be expected of a private investor operating in a market economy. SEA would be able to resume its search for a strategic ground handling partner, for example, in order to develop its own business in the sector, at the Milan airports and elsewhere, and potentially also in order to expand its business to specialist services that it did not yet provide.

(132) Many airport managers of a comparable business type, including larger undertakings such as […], had expressly ruled out any intention of withdrawing from ground handling services, even though they had sometimes been encouraged to do so by financial analysts, thus confirming the validity of this commercial model.

5.2. *[…]*

(133) […] pointed out that the ground handling industry generally generated profits despite the reduced margins. Staff costs made up a significant part of each operator's outgoings, probably somewhere between 60 and 70 % of revenue, and it was therefore vital to keep close control of operations using specific planning systems.

(134) There were economies of scale in the sector: the cost per passenger fell as the number of passengers rose. The optimum level of cost per passenger was reached when 8-9 million passengers were being managed in a year, and SEA Handling comfortably surpassed this level, handling around 22 million passengers at the two airports with a market share that was constantly above 70 %.

(135) […] cited SAGAT Handling as an example of an undertaking that was profitable on the market, managing around 2,5 million passengers in 2009 with a staff cost equivalent to around 55 % of its turnover. It also cited Fraport Ground Services Austria, Swissport, and Menzies.

(136) The primary cause of SEA Handling's poor profitability was its high staff costs, which consistently exceeded 85 % of its turnover between 2002 and 2008, a burden which […] saw as unsustainable. […] found this particularly surprising in that SEA Handling seemed to have access to the *cassa integrazione* layoff fund.

(137) The possibility could not be ruled out that SEA Handling might have received aid in other forms. […] suggested that SEA Handling's push-back, tow-in, de-icing and bussing services were provided by SEA, while SEA Handling sold such services to its clients. […] expressed doubts regarding the regularity of operations given the lack of transparency with regard to the billing of these services to SEA Handling.

(138) Likewise, SEA might be giving further support to SEA Handling by providing its own staff. Without proper billing SEA Handling might have been receiving unlawful aid.

(139) SEA might also be giving aid to SEA Handling by making combined offers to airlines proposing a discount based on the provision of SEA Handling services. From newspaper reports […] had observed that whenever SEA attracted a new airline the ground handling services were almost always provided by SEA Handling.

(140) Finally, […] collective agreement between ground handling service providers and the trade unions. This agreement applied to all personnel of ground handling service providers. Only SEA continued to apply its own collective agreement, which was less favourable to SEA both economically and legally and in both the short term and the long term: this was a choice that was not consistent with policy that was stated to be focused on cutting costs.

6. OBSERVATIONS MADE BY THE ITALIAN AUTHORITIES IN RESPONSE TO THE COMMENTS SUBMITTED BY INTERESTED PARTIES

(141) The Italian authorities submitted their own observations in response those put forward by […].

(142) The Italian authorities contended that the first argument, based on the idea that the profitability of a ground handling company depended on the volume of traffic it managed and thus on the number of passengers it served, was a simplistic argument deriving from an abstract assessment that took no account of the fact that SEA's decisions were guided by long-term economic considerations. This economy of scale was not a decisive factor in a ground handling company's economic performance. More specifically, the revenue of such a company was entirely unrelated to the number of passengers managed, but depended on the number of flights served and their tonnage.

(143) For purposes of the private investor test the main question was not whether the company might have been able to make profits which, for whatever reason, it had proved unable to achieve, but whether the shareholder had a sound economic interest in investing in the company in the hope of gaining a return on its investment, even in the long term, or even in strategic terms rather than purely financial terms. Accordingly, the fact that the firm was potentially in a position to generate profits suggested that it did satisfy this test.

(144) The Italian authorities also argued that in order to make a profit it was not sufficient to handle a large volume of traffic. They stressed the importance of operating over a broad network of airports, to which they had already drawn attention in the past.

(145) A ground handling services provider which was not linked to an airport manager, and which did not hold a dominant market position at a given airport, could follow a commercial strategy that focused solely on the services it considered profitable. SEA Handling could not follow such a strategy: as a subsidiary of the airport manager, given the airport manager's obligations towards the regulatory authority (ENAC) to ensure continued and effective provision of the entire range of ground handling services exhaustively listed in Directive 96/67/EC at Linate and Malpensa airports, it could not choose to provide only the services that were the most economically advantageous, or to provide services only at certain times of the day.

(146) The Italian authorities disputed the statement that a large number of European ground handling undertakings had substantial profit margins. In 2009, the seven biggest operators on the Italian market recorded losses (in addition to SEA Handling these were Aviohandling, Flightcare, ATA Handling, Aviapartner, Marconi Handling and SAGA). Only SAGAT Handling, whose share of the Italian ground handling market was very small, made a profit, and that profit was modest.

(147) In any event, SEA handling's economic performance could not be compared with those of operators in the sector in Italy or in Europe such as SAGAT Handling, Fraport Ground Services Austria, Swissport or Menzies. Nor did these arguments help with the analysis for purposes of the private investor test; it had to be asked, rather, whether there were other operators comparable to SEA Handling whose shareholders, even if private, had taken decisions similar to those of SEA. The activities of SAGAT Handling and of SEA Handling presented different levels of complexity. Menzies Aviation and Swissport were independent ground handling undertakings operating in the form of an international network, and their economic indicators could not be reliably compared to those of SEA Handling for reasons already explained by the Italian authorities.

(148) It had been argued that staff costs had an excessive impact on SEA Handling's turnover compared to the industry average, and that this was evidence of a failure to comply with the private investor test; the Italian authorities contended that this argument took no account of the diversity between different operators. More specifically, operators that had been created following the separation of ground handling and airport management services, like SEA Handling, were inevitably going to experience a higher labour cost compared to new players, at least during their first years of operation.

(149) For subsidiaries of an airport manager which offered the full range of ground handling services, this average impact of staff costs on turnover had to be set at 70-75 %. The higher cost was due to the fact that such undertakings used highly qualified personnel with extensive knowledge of the industry and of the rules and procedures by which it was governed, and were able to provide the entire range of ground handling services. As such, the shareholder/airport manager, despite wanting to gradually reduce the impact of labour costs, would attach greater importance to the preservation of accumulated expertise and integration with ground handling services, both of which were of significant strategic value to the group. The Italian authorities also pointed out that new market players were not affected by historic costs resulting from pre-existing contracts.

(150) The Italian authorities said the shifts in the impact of labour costs on turnover were very different from what had been described by […]: over the period 2002-2011 the movement had been positive, reaching just under 80 % in 2010, with a trend towards the average for independent ground handling operators, which was just under 70 %.

(151) Regarding the suspected forms of aid indicated by […], the Italian authorities rejected what they considered mere suppositions put forward without any foundation or supporting evidence.

(152) The services for which SEA Handling uses SEA (push-back, tow-in, bussing) were governed by paid subcontracting agreements, concluded on market terms, as shown both in the customer airline agreements and on the certificate issued by ENAC. Access to those services was provided in a way that did not discriminate against any other operator requesting them, and the outsourcing of certain services was common practice in the Italian ground handling industry.

(153) The affirmation that SEA Handling used SEA staff free for the provision of ground handling services was unfounded, and when ground handling services were hived off all the skills required for the provision of such services had been allocated to SEA Handling's cost centres.

(154) With regard to the alleged concession by SEA of more favourable terms to new airlines for access to the Milan airports (i.e. discounts) on the condition that they favour SEA Handling over its competitors, the Italian authorities considered this claim to be completely unfounded, devoid of any proof and indeed contradicted by the facts, since leading carriers such as Gulf Air at Malpensa and Air Malta, Air Baltic and Carpatair at Linate had chosen providers that were competitors of SEA Handling.

(155) Finally, concerning the application to SEA Handling employees of SEA's collective bargaining agreement rather than the new collective bargaining agreement specifically for workers in the ground handling industry, […], even if this were to prove more advantageous than its predecessor from an economic and regulatory perspective, the Italian authorities emphasised above all that, irrespective of the content and application of the agreement in question, the objection raised was irrelevant in these proceedings, given that it concerned an event that had occurred outside the relevant period.

(156) In any case, having regard to the collective bargaining agreement, which consisted of a general, all-inclusive part and three specific sections, negotiated separately by each of the representative associations affected (Assoaeroporti, Assohandlers and Assocatering), SEA Handling applied the general part of the agreement to its employees, along with the specific rules negotiated by Assoaeroporti, because SEA Handling could not exempt itself from compliance with the agreements concluded previously with union organisations, as described in the union agreement of 4 February 2002 ([27]), according to which 'SEA Handling will apply the collective bargaining agreement signed by Assoaeroporti and union organisations'.

7. ADDITIONAL INFORMATION SUBMITTED ON 28 JUNE 2012

(157) Following the meeting of 19 June 2012, the Municipality of Milan submitted additional observations setting out its assessment of the measures in question, particularly regarding its view that the reorganisation of SEA Handling was an internal matter for the SEA group, the business model chosen by SEA for the development of the airports under its management, and the need to distinguish between the different periods under investigation.

The reorganisation of SEA Handling is an internal matter for the SEA group

(158) The Milan authorities reaffirmed that at no time had SEA sought financial support for its recovery from its shareholders, the Municipality and Province of Milan. On the contrary, the public authorities in question had received substantial dividends from the SEA group, totalling EUR 550 million over the period 2002-2012.

(159) It could not be assumed — and it had yet to be shown — that if SEA had decided not to cover the debts of the handling company, and instead to use the services of an independent operator, the public authorities would have received an even higher financial benefit. This was due essentially to the difficulty of obtaining from outsiders, at competitive prices, all the ground handling services which SEA, as airport manager, was required to provide to all airlines and passengers on a continuous, accessible and comprehensive basis, in accordance with the regulations in force; to the difficulty of maintaining supervision over service quality, a requirement which was vital to airport competitiveness and to the recovery of traffic (which SEA had in fact achieved thanks to its chosen business model); and to the intrinsic link between the company's business model and the airport's hub model (particularly after Alitalia's de-hubbing from the Milan Malpensa airport and the need to develop a self-hub or virtual hub concept). The Municipality of Milan was unaware of any assessments made by the Commission, or by independent experts on its behalf, which might serve to dispute these affirmations.

(160) Finally, given the lack of any financial flows originating with SEA's public shareholders, and the fact that the decision to reorganise SEA Handling was in line with SEA's strategic objectives, any finding that the measures at issue constituted State aid should be accompanied by proof of the imputability to the State of every single decision to cover losses made during the entire period in question, and especially in the second phase (post-2007), to which the considerations in the opening decision did not apply, although the Municipality in any event disputed them.

The SEA group business model

(161) The Milan authorities reiterated that the chosen model, based on the option not to outsource ground handling services, would benefit long-term airport development. This course was preferable from a group perspective when the airport system in question acted as a hub. The management of an airport system based on the presence of a hub carrier, or on the provision of hub activity, given the high degree of complexity of the system, required that the manager should provide some airport services direct, including handling, in order to ensure the efficient operation of the airport. The Milan authorities cited the examples of Frankfurt, Vienna and Paris airports. The choice was justified by the following considerations:

(a) It was consistent with SEA's goal of developing its hub activity at the Milan Malpensa airport, which required continuous supervision, monitoring and management of ground handling services provided to the hub carrier, and was even more important when pursuing a self-hub or virtual hub model. Under the 'self-hub' or 'virtual hub' model the airport would be developed as a hub without the presence of one or more hub carriers. Under this model the airport manager itself would offer users the opportunity to use the airport as a hub, and would connect arriving and departing flights operated by all carriers at the airport irrespective of whether any interconnection agreements between carriers were in place.

([27]) The Commission assumes that the Italian authorities are actually referring to the union agreement of 4 April 2002 mentioned above.

(b) It was supported by the fact that the biggest and best-performing airport hubs in continental Europe had opted for the same solution.

(c) It was necessary for developing freight traffic at the Milan airports, a sector in which competition between European airports was seeing strong growth, and the potential for attracting new carriers was also related to the level of specialisation of handling services. The commercial model selected by SEA had allowed constant growth in freight activity in Milan, which was in first position in Italy and sixth in Europe, with the highest concentration of all-cargo carriers originating in the Middle and Far East, which were the areas experiencing the fastest economic growth in the world.

d) It was consistent with the business model chosen for increasing the capital of the airport management company with a view to its subsequent privatisation.

Distinction between the periods under investigation for the purpose of assessment of the measures

(162) The Milan authorities cited the 2003-2007 business plan, which had been submitted to the Commission after the formal investigation procedure was initiated. In their opinion, the plan showed that SEA's actions in covering the losses were decided in compliance with the private investor test.

(163) However, the analysis of the SEA Handling 2003-2007 business plan must in any event demonstrate that the reorganisation of SEA Handling complied with the Community guidelines on State aid for rescuing and restructuring firms in difficulty ('the 2004 Restructuring Guidelines') ([28]), given that the reorganisation was carried out with a significant contribution from the subsidiary, the financial intervention was limited to the minimum needed in order to prevent a situation of insolvency arising under the applicable corporate law regulations, and SEA Handling had put all of its own efforts into the recovery, losing market share to its competitors and giving up certain peripheral activities outside its core business.

(164) While the shareholder's hopes of a recovery within the planned five-year period had been frustrated by a series of external events, combined with the difficult initial situation of the company (which was not formed as a start-up, but as a spin-off of an existing company division in difficulty) and the complete liberalisation of the ground handling market in Italy, nevertheless the efforts made in the first, challenging period showed that the recovery of SEA Handling was certainly possible. At the end of that first period, the company found itself in an economic situation and with a productivity level that were significantly better than in 2002.

(165) Regarding the second phase of the recovery, the Milan authorities referred to the SEA group's strategic plans for 2007-2012 and 2009-2016. According to the SEA group, break-even point was expected to be reached in the course of 2012. If despite the evidence submitted the Commission were to take a contrary view, the Milan authorities considered that it should analyse each of the interventions in the capital of SEA Handling individually, to establish the presence of aid and in particular the imputability of the aid to the Municipality of Milan, which was firmly denied.

8. ASSESSMENT OF THE MEASURES UNDER ARTICLE 107(1) OF THE TFEU

(166) Following the formal investigation initiated in compliance with Article 108(2) of the TFEU, and taking into account the arguments put forward by the Italian authorities and by the interested parties, the Commission considers that the measures in question constitute State aid which is incompatible with the internal market under Article 107(1) of the TFEU and inadmissible under Article 108(3) of the TFEU.

(167) Regarding the period to which this decision relates, the Commission asked Italy to provide any information it judged necessary to determine the compatibility of the measures in question, specifying the period indicated in Section 2.1 and Section 5 of the opening decision. In Section 5, the Commission asked it to provide the 2002 business plan for SEA Handling, with any subsequent amendments, or any document concerning the strategy and return to profitability of SEA Handling; SEA Handling's economic results for the entire 20022009 period; the exact amounts and form of compensation of losses and, in particular, all relevant data for the period from 2005 to date.

([28]) OJ C 244, 1.10.2004, p. 2.

(168) In any case, the Italian authorities were asked to submit their observations on the entire duration of the period examined in the opening decision. In paragraph 42 of the decision the Commission particularly stipulated that the Commission therefore deems it necessary to examine the period 2002-2010 to determine whether SEA Handling received illegal State aid in the form of compensation for losses during that period.

(169) Moreover, since the Italian authorities had not provided the above information for the whole of the period expressly referred to in the opening decision, the Commission specified the documents to be provided and the period under examination for a second time in its letter of 11 July 2011.

(170) Following this letter from the Commission, the Italian authorities submitted observation and provided details up to 2010, mainly in their letter of 15 September 2011.

(171) Additionally, the Commission observes that the measures investigated for the period 2006-2010 were of the same kind as those examined for the previous period, namely capital injections to cover operating losses, and were adopted by the same body for the benefit of the same company. The Commission therefore had a duty to examine the entire period in question within the context of these proceedings.

(172) For these reasons the Commission considers that the period under investigation runs from the date on which SEA Handling was set up in 2002 until the Commission's decision to initiate the formal investigation on 23 June 2010.

(173) This Decision first addresses the question whether SEA Handling was a firm in difficulty within the meaning of the Community Guidelines on State aid for rescuing and restructuring firms in difficulty of 1999 ('the 1999 Restructuring Guidelines') ([29]) and the 2004 Restructuring Guidelines (Section 8.1). The Commission then assesses whether the measures in question constitute State aid to SEA Handling within the meaning of Article 107(1) of the TFEU (Section 8.2), and, finally, whether such aid can be declared compatible with the internal market (Section 8.3).

8.1. *SEA HANDLING'S DIFFICULTIES*

The 1999 Restructuring Guidelines

(174) Point 5 of the 1999 Restructuring Guidelines states that a firm is regarded as being in difficulty where more than half of its registered capital has disappeared and more than one quarter of that capital has been lost over the preceding 12 months; or … where it fulfils the criteria under its domestic law for being the subject of collective insolvency proceedings.

(175) Point 6 of the 1999 Restructuring Guidelines states that the usual signs of a firm being in difficulty are increasing losses, diminishing turnover, growing stock inventories, excess capacity, declining cash flow, mounting debt, rising interest charges and falling or nil net asset value.

(176) The General Court has confirmed that the fact that point 6 of the 1999 Restructuring Guidelines refers to 'increasing' losses cannot prevent the Commission from taking into account the continuous presence of losses over several consecutive years as a sign of financial difficulties, even though those losses were not increasing ([30]). The Commission considers that in 2002, at the time when the decision to carry out an initial injection of capital was taken, SEA's financial difficulties were evident. The company's situation improved significantly in the period 2003-2004 period. It was working against substantial losses which generated a cumulative operating loss of more than EUR 140 million in three years.

(177) The General Court has also accepted that a substantial reduction in a company's capital is a relevant factor in determining whether the firm is in difficulty ([31]). The Commission considers that the continuing losses recorded by the company, the consequent reduction of its capital, and the decision by SEA to carry out the injections of capital to which this investigation relates in order to address that reduction, clearly show that the company was facing serious financial difficulties throughout the period under investigation. In its annual reports and accounts at 31 December 2002, 2003 and 2004, the company itself declared losses at SEA Handling which exceeded one third of its capital.

([29]) OJ C 288, 9.10.1999, p. 2.
([30]) Joined Cases T-102/07 and T-120/07 *Freistaat Sachsen, MB Immobilien Verwaltungs GmbH and MB System GmbH & Co. KG* v *Commission [2010] ECR-II-585*.
([31]) Case T-565/08 Corsica Ferries France v Commission [2005] ECR II-2197, paragraph 105.

(178) The General Court has also held that the list of economic factors that may indicate that a firm is difficulty set out in the 1999 Restructuring Guidelines is not exhaustive ([32]). SEA Handling's debts rose from EUR 250,3 million in 2002 to EUR 310,6 million in 2003, and fell only slightly in 2004, down to EUR 259,3 million. The net asset value of SEA Handling also fell, from EUR 35,1 million in 2002 to EUR 34,8 million in 2003. These indicators too highlight the financial difficulties faced by the firm in 2002 and 2003.

(179) The annual report and accounts at 31 December 2003 refer to the negative results of SEA Handling, whose costs remained too high in relation to its market share irrespective of the partial benefit deriving from the labour force agreements. The prospect of a further decline in volume of handling activities in future years means the company will be unable to achieve economic balance within the proposed time-frames. Similarly, the annual report and accounts at 31 December 2004 state that returning SEA Handling to viability in the next few years remains difficult, particularly in light of the growing competition in the market following the arrival of new operators. Similar statements are contained in the report and accounts at 31 December 2005.

(180) Finally, the fact that the company was in difficulty at the time of the first injection of capital has also been repeatedly reiterated by the Italian authorities and by SEA ([33]), and has been confirmed in the many business plans submitted to the Commission. It will be enough to point out that the 2002-2006 consolidated business plan envisaged that ground handling activities would return to profitability gradually by 2003 (p. 31). SEA Handling itself confirmed, in its comments on the opening decision, that it would not have been able to absorb its losses for the period 2003-2005. If those losses had not been covered by SEA, SEA Handling would have been insolvent.

The 2004 Restructuring Guidelines

(181) The definition of a firm 'in difficulty' remains substantially unchanged in the 2004 Restructuring Guidelines. The provisions in points 5 and 6 of the 1999 Restructuring Guidelines reappear as points 10 and 11 of the 2004 Restructuring Guidelines.

(182) In addition, point 11 of the 2004 Restructuring Guidelines states that Even when none of the circumstances set out in point 10 are present, a firm may still be considered to be in difficulties, in particular where the usual signs of a firm being in difficulty are present, such as increasing losses, diminishing turnover, growing stock inventories, excess capacity, declining cash flow, mounting debt, rising interest charges and falling or nil net asset value.

(183) Neither the company's debt nor its net asset value improved significantly over the period 2004-2010. SEA Handling experienced losses for the entire period. The situation was exacerbated in 2007 when it recorded an operating loss of more than EUR 59 million, followed in 2008 by an operating loss of EUR 52,4 million. Over the 2004-2010 period total turnover fell from EUR 177,4 million in 2004 to EUR 125,9 million in 2010. In the same period, SEA Handling received injections of capital totalling more than EUR 270 million.

(184) Several documents submitted by the Italian authorities confirm that SEA Handling was in financial difficulty even after 2004. For example, the minutes of the SEA Handling board of directors meeting held 31 May 2007 explain that SEA Handing requires an in-depth reorganisation, suggesting that the measures previously adopted were not sufficient to resolve the firm's difficulties. Similarly, the minutes of the SEA Handling board of directors meeting held 21 December 2006 report that one of its members reiterated that the situation of SEA Handling was still 'seriously alarming'.

(185) All this shows that SEA Handling must be considered a firm in difficulty within the meaning of point 11 of the 2004 Restructuring Guidelines, according to which a firm may be considered to be in difficulty in particular where the usual signs of a firm being in difficulty are present, such as increasing losses, diminishing turnover, growing stock inventories, excess capacity, declining cash flow, mounting debt, rising interest charges and falling or nil net asset value

([32]) See note 32.
([33]) For example, Annex 12 to the observations of the Italian authorities of 14 November 2011.

(186) The Commission has no doubt that SEA Handling was a firm in difficulty when the measures were decided. This conclusion is further supported by the fact that even before the ground handling business was transferred to SEA Handling in 2002 it was making a loss. The substantial and recurring gap between SEA Handling's revenues and costs, and its repeated losses, mean that SEA Handling was a firm in difficulty throughout the entire period under investigation ([34]).

8.2. *EXISTENCE OF STATE AID*

(187) According to Article 107(1) of the TFEU, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

(188) For a national measure to constitute State aid, all of the following criteria must be satisfied: 1) the measure must be granted using State resources; 2) the advantage must be selective and must confer an economic benefit; and 3) the measure must distort or threaten to distort competition and must affect trade between Member States ([35]).

(189) The reasons that lead the Commission to consider that the measures in question satisfy all those conditions are set out below.

8.2.1. STATE RESOURCES AND THE IMPUTABILITY OF THE MEASURES TO THE STATE

(190) First, it should be recalled that the concept of State resources includes aid granted directly by the State, but also by public or private entities established or appointed by the State to manage the aid. The concept covers all the financial means by which the public authorities may actually support undertakings, irrespective of whether or not those means are permanent assets of the public sector. Therefore, even if the sums corresponding to a State aid measure are financial resources of public undertakings and are not permanently held by the Treasury, the fact that they constantly remain under public control, and therefore available to the competent national authorities, is sufficient for them to be categorised as State resources ([36]).

(191) The resources used to cover the losses of SEA Handling were of public origin, because they came from SEA, 99,12 % of whose capital was owned during the period under investigation by the Municipality and the Province of Milan ([37]). The fact that the transfers were made by SEA rather than by the abovementioned local authorities does not mean they were not of public origin. It thus needs to be determined whether the actions of the organisation in question are to be considered the result of conduct imputable to public authorities.

(192) The Commission confirms its initial assessment that the measures are indeed imputable to the Italian authorities, and more specifically to the Municipality of Milan. First, in their observations of 15 September 2010 the Italian authorities acknowledged that the Municipality exercised control over SEA, appointing the members of its board of directors and audit board. Second, the Commission reaffirms the value of the evidence of imputability referred to in the opening decision. That evidence is valid for the entire period under investigation, and for all the injections of capital considered in this Decision.

(193) As a preliminary remark the Commission would point out that the Court of Justice held in the *Stardust Marine* judgment that It is … necessary to examine whether the public authorities must be regarded as having been involved, in one way or another, in the adoption of those measures. On that point, it cannot be demanded that it be demonstrated, on the basis of a precise inquiry, that in the particular case the public authorities specifically incited the public undertaking to take the aid measures in question. In the first place, having regard to the fact that relations between the State and public undertakings are close, there is a real risk that State aid may be granted through the intermediary of those undertakings in a non-transparent way and in breach of the rules on State aid laid down by the Treaty ([38]).

([34]) The improvement of the firm's economic situation, which may have been the result of repeated grants of illegal State aid, cannot be invoked to show that the firm had overcome its financial difficulties. The aid should have been granted only if it was compatible with the Treaty and in accordance with the procedure laid down in Article 108(3) of the TFEU.

([35]) See, for example, the judgment of the Court of Justice in Case C-222/04 Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze [2006] ECR I-289, paragraph 129.

([36]) Judgment in *Stardust Marine*.

([37]) In December 2011 29,75 % of SEA's capital was sold to the private fund F2i (Fondi italiani per le infrastrutture).

([38]) *Stardust Marine*, paragraphs 52 and 53.

(194) The Court also found that to demonstrate imputability the Commission could base its reasoning on any other indicator showing, in the particular case, an involvement by the public authorities in the adoption of a measure or the unlikelihood of their not being involved ([39]).

(195) The first category of evidence, consisting of numerous documents ([40]), indicates that the coverage of losses of SEA Handling by SEA was carried out at the request of the Municipality, or at least with its active involvement. The Commission confirms its assessment of the documents in question, which clearly show that the Municipality of Milan was involved in the management of SEA Handling, through SEA, especially with a view to maintaining employment levels.

(196) This is particularly evident from the record of the union agreement between SEA and the unions dated 4 April 2002, which states that SEA … undertakes … to bear the coverage of losses in order to balance the finances and assets of SEA Handling SpA and that those commitments are guaranteed by the agreement signed by the Municipality of Milan, among other things in its capacity as the absolute majority shareholder (in SEA SpA), by the contributions made, by the financial resources not subject to legal limitations transferable by SEA SpA to SEA Handling SpA, and by the solidity of the assets of the assets and finance of SEA ([41]).

(197) In the same way, all the documents mentioned in the opening decision (Sections 2.4.2 and 3.1.1.2) ([42]) demonstrate that the Municipality of Milan was intervening in the running of SEA Handling through SEA, especially with a view to maintaining employment levels.

(198) The Commission considers that the steps taken by the Italian authorities, particularly at the meeting of 26 March 2002, guided the decisions taken by SEA with regard to its subsidiary SEA Handling. In the agreement reached on that date, the Municipality of Milan gave specific commitments with a direct impact on the running of SEA Handling and on SEA's role in the management of its subsidiary; moreover, the Municipality undertook to monitor the application of the agreement, evaluating its implementation at regular intervals. The involvement of the Municipality of Milan is therefore not a harmless factor of no importance, as the Italian authorities and SEA suggest. SEA could not ignore the commitments and requirements that the public authority and controlling shareholder had accepted in that agreement, but had to bear them in mind when it took the measures regarding the management of SEA Handling. The Commission also considers that the measures to cover losses were more than 'guided' by the commitment given by the Municipality of Milan in the agreement of 26 March 2002, and that they were in fact the result of that commitment.

(199) The Commission rejects the statement that the Municipality of Milan did not take on any role when it gave the abovementioned commitment, and simply confirmed the employment protection strategy adopted by SEA to the unions.

(200) The fact that the Municipality did not take part in the signing of the union agreements which followed the agreement of 26 March 2002 is no justification for ignoring the significant influence it had on those subsequent union agreements. More specifically, the references in the union agreements of 4 April 2002 and 9 June 2003 to the commitment given by the Municipality are sufficient proof of the meaning of the agreement of 26 March 2002 and its influence on the subsequent union agreements. SEA stated that the union agreement of 4 April 2002 was still applicable and that it had to continue to adhere to its provisions. Further, the Italian authorities have also argued that SEA Handling could not exempt itself from compliance with the agreements concluded previously with union organisations, so that it could not dismiss personnel, which in the Commission's view demonstrates the scope of those agreements and thus the involvement of the public authorities.

(201) Finally, the Commission has identified other evidence that shows that the Municipality of Milan was involved at all times when SEA took important decisions with regard to SEA Handling. In the minutes of the meeting of the SEA board of directors report dated 31 May 2007, with regard to the submission to the board of the SEA business plan (which, according to the Italian authorities, was also to serve as the business plan of SEA Handling), it is stated that the plan had already been submitted to SEA's majority shareholder, which had expressed its opinion. Subsequently, as recorded in the minutes of the meeting of SEA Handling's board of directors dated 13 June 2008 with regard to the implementation of SEA Handling's 2009-2016 strategic plan, the chairman of the board stated that the strategic plan had been agreed with the Municipality/shareholder. The Commission considers that both documents make it clear that the Municipality's role went beyond that of a normal shareholder, who would have been informed of the operating decisions of the board of directors and would have evaluated them primarily through the company's

([39]) *Stardust Marine* judgment, paragraph 56.

([40]) In particular the union agreement signed on 26 March 2002 between the Administration of the Municipality of Milan, SEA and the unions; the record of an agreement between SEA and the unions dated 4 April 2002; and the record of an agreement between SEA, SEA Handling and the unions dated 9 June 2003.

([41]) See the final recital to the record of the union agreement between SEA and the unions dated 4 April 2002. The idea that the commitments made by SEA to SEA Handling are backed by the majority shareholder is also expressed in the fourth recital and at the end of Section 2 of the same document.

([42]) These sections of the opening decision are to be considered an integral part of this Decision.

internal bodies and its official communications. The insistence on the fact that the business plan had been previously agreed with the shareholder confirms the shareholder's predominant role in SEA's strategic choices. This role is also reflected in the facts set out in paragraph 51 of the opening decision, in paragraph 35 of this Decision (a member of the municipal executive had asked the chairman of SEA and the mayor of Milan to appear before the municipal Committee on Transport to explain how they intended to relaunch SEA Handling), and in paragraphs 69 and 70 of the opening decision (with reference to the strict links between the top management of SEA and SEA Handling, whose appointment is controlled by the Municipality).

(202) The Commission also confirms the validity of the second piece of evidence of imputability found, namely the particular dependency of SEA's directors and managers on the Municipality of Milan.

(203) Contrary to the Italian authorities' contentions, the Commission considers statements made in press reports as valid evidence only when they report verified facts ([43]). Neither the Italian authorities nor SEA have disputed the facts in question, nor have they commented on the fact that in 2006 the mayor of Milan, Letizia Moratti, called for and secured the resignation of the then chairman and managing director, Mr Bencini, two years prior to the natural conclusion of his term ([44]).

(204) In any event, the Commission points out that in *Stardust Marine* the Advocate General said that 'Because of the difficulties of proof and the obvious danger of circumvention' evidence of State aid might be inferred even from 'press reports' ([45]).

(205) According to SEA, the press reports and the facts reported therein date from 2006 and cannot prove anything regarding the Municipality's influence on SEA; the Commission considers that the evidence of the dependency of the directors indicate the general context of the working of SEA, and thus the context in which the annual decisions to cover SEA Handling's losses were taken. In any event, the Commission's investigation also covers the period after 2006.

(206) Third, with regard to the blank resignations submitted by SEA directors to the mayor of Milan, the Commission does not share the view of SEA and the Italian authorities that those letters, which allegedly had only a moral value and no legal validity, were not likely to influence the actions of members of the board of directors. The Commission considers that this practice can have had no other purpose than to tighten the Municipality of Milan's control over SEA's directors, unequivocally reinforcing its power to hold the directors to account, a power which the Municipality ought to have exercised only within the limits of its rights as a shareholder in SEA. Even if the letters had only a moral value, which does not seem to be the case, they would still confirm the public authorities' interference in the running of SEA. In any event, the Commission points out that on p. 37 of their observations of 15 September 2010 the Italian authorities reiterated that, rather than having a purely moral value, the letters legally prevented the director in question from seeking compensation for unfair dismissal under the Italian civil code. The Municipality, which controls the shareholders' meeting, also holds tight control over the directors, since even if they have acted in the best interests of the company they can be removed by the general meeting without any entitlement to compensation for unfair dismissal. SEA Handling contends that the board of directors cannot have been influenced by the blank resignations because it did not accept a request made by the public shareholder that it distribute EUR 250-280 million in extraordinary dividends; the Commission observes that the minutes of the SEA general meeting of 24 February 2006 made it clear that a distribution of no more EUR 200 million in extraordinary dividends would allow the company to maintain a rate of debt compliant with the average rate for comparable firms and would ensure sufficient financial flexibility. Second, the same document specifies that SEA had set the level of dividends at EUR 200 million on objective grounds and that it represented the maximum that the company could pay out in the light of the financial indicators at the time. The management report for 2006 confirms that indebtedness had been increasing (it had doubled in 2006 as compared to 2005) owing partly to the fall in liquidity caused by the distribution of extraordinary dividends to shareholders. Had SEA paid out higher dividends, it would have been more difficult to cover SEA Handling's losses that year. Moreover, the fact that a shareholder may request a certain amount in dividends on certain occasions whereas the management then pays out a lower figure seems to be a normal occurrence in the life of a company, and is not in contradiction with the strict control of the management by the same shareholder.

([43]) The Commission refers to the press reports mentioned in paragraph 67 of the opening decision. See also 'Sea, nuovo attacco della Provincia' (SEA, renewed assault from the Province), *la Repubblica,* 25 February 2006; 'Sea, Penati chiede le dimissioni del consiglio' (SEA, Penati asks for the board to resign), *l'Unità,* 25 February 2006.

([44]) See http://archiviostorico.corriere.it/2006/novembre/17/articoli_del_17_novembre_2006.html

([45]) Opinion in *Stardust Marine,* paragraph 68.

(207) The Commission considers that this practice constitutes an objective reflection of a situation of dependency. Without being able to judge the precise influence of this practice *a posteriori*, the Commission considers that merely by their existence *(a priori)* the letters of resignation were certainly capable of influencing the actions of the members of the board of the directors appointed by the Municipality of Milan. The public authorities did not even have to refer to the letters in order to exercise such influence, it being evident that their existence alone placed the directors in a position of subordination to the mayor of Milan.

(208) With regard to the statements made by the Italian authorities concerning the designation of directors, the Commission repeats that the Municipality, *de facto*, 'appoints the members of the board of directors'. This is clear from the fact that, as the Italian authorities have stated, the Municipality designates the directors, who are then appointed by the general meeting, of which the Municipality forms a part as majority shareholder. This formal control exercised by the Municipality over SEA is not in itself sufficient to prove that the Municipality does in fact exercise control over SEA in the particular case, but it does help to prove it.

(209) The Italian authorities have put forward counterevidence to show that the measures were not imputable to the State, namely the fact that members of the Municipal Executive had been denied access to SEA internal documents on several occasions; the Commission considers this evidence to be inconclusive, since mere compliance with the formal requirement in the Italian civil code not to disclose internal company information, such as the minutes of the board of directors, does not prevent the exercise of influence by the Municipality over SEA in fact, both in general and in the case in point. Furthermore, the Commission observes that the members of the municipal council who were denied access to certain documents belonged to the opposition, and did not form part of the Municipality's executive body. When the Commission affirms that the Municipality of Milan keep SEA in a state of dependency on it, it is referring more especially to the authorities who exercise the power to take decisions on behalf of the Municipality, and who are consequently in a position to influence the management of the company.

(210) Fourth, on a general level, given the importance of the operation of Malpensa and Linate airports in the local socioeconomic context and their vital role in policy, in terms of both transport and regional development, the local public authorities will not as a rule be 'absent' when the airport operator makes important decisions concerning the functioning and long-term development of such infrastructures, especially when such an authority is also the airport manager's controlling shareholder. In their observations the Italian authorities have confirmed the political importance of the measures in question. In the case in point, furthermore, the measures to cover SEA Handling's losses were at least an integral part of the SEA group's strategy, as the Italian authorities explain in their observations.

(211) Fifth, the measures to cover losses, implemented through increases in SEA Handling's capital, were not ordinary management measures but exceptional measures. The extraordinary character of the measures is reflected both in economic terms, given the scale of the amounts in question (each absorption of losses was offset by means of a capital increase of several million euros), and in political terms, given the anticipated impact of the measures on the maintenance of employment.

(212) In view of their exceptional nature, the measures were not adopted by SEA's board of directors, exercising its own powers: in accordance with SEA's constitution and the principles laid down in the civil code they had to be expressly approved by the general meeting, at which the Municipality is the majority shareholder. There is therefore no doubt that the Municipality was fully informed of the measures and approved them, as shown in the minutes of the general meeting. Not only did the measures originate with it, as a result of its participation in the agreement of 26 March 2002, but it was also informed of every measure to cover SEA Handling's losses, which it systematically approved. Such exceptional measures are therefore necessarily imputable to the State.

(213) The Commission observes that in the *Stardust Marine* judgment, the Court of Justice found that imputability could be inferred from any other indicator showing, in the particular case, an involvement by the public authorities in the adoption of a measure or the unlikelihood of their not being involved, having regard also to the compass of the measure, its content or the conditions which it contains ([46]).

(214) Finally, as shown in Section 8.2.3, the fact that SEA was not acting in conformity with the private investor test confirms that the public authorities were involved in the measures under discussion ([47]).

([46]) *Stardust Marine* judgment, paragraph 56.
([47]) Opinion of Advocate General Jacobs in *Stardust Marine*, paragraph 67.

(215) In the particular case, given the scale of the measures and of the other factors identified in this Decision and in the opening decision, the Commission considers that it has sufficient evidence to demonstrate the imputability of the measures in question to the Italian State, given the involvement of the Municipality of Milan in the measures to cover SEA handling's losses, or the improbability of the public authorities not being involved.

(216) Consequently, the Commission must reject the Italian authorities' suggestion that the Commission should analyse each of the measures taken with regard to the capital of SEA Handling individually, in order to verify the existence of aid and, in particular, the imputability of any such aid to the Municipality of Milan. The factors described in paragraphs 174-186, and the analysis of the measures from the perspective of a private investor, provide sufficient evidence that the coverage of losses through injections of capital can only be the result of a strategy and an involvement on the part of the public authorities during the entire period under investigation. The Italian authorities have themselves stated that while the decisions to cover the losses were formally adopted on an annual basis, there was a multiannual strategy to cover losses over the period needed for restructuring (see paragraphs 225-232).

(217) The Commission therefore concludes that the measures must be considered imputable to the State.

8.2.2. THE SELECTIVE NATURE OF THE MEASURES

(218) The measure at issue is selective, because it relates only to SEA Handling.

8.2.3. THE APPLICATION OF THE MARKET-ECONOMY PRIVATE INVESTOR TEST AND THE PRESENCE OF AN ECONOMIC ADVANTAGE

(219) Regarding the existence of an economic advantage, it is necessary to determine whether, in similar circumstances, a private investor would have covered losses of the kind that were covered here. The Court of Justice has held that although the conduct of a private investor with which the intervention of a public investor pursuing economic policy aims must be compared need not be the conduct of an ordinary investor laying out capital with a view to realising a profit in the relatively short term, it must at least be the conduct of a private holding company or a private group of undertakings pursuing a structural policy — whether general or sectoral — and guided by prospects of profitability in the longer term ([48]).

(220) The Court has also ruled that a private shareholder may reasonably provide the capital necessary to secure the survival of an undertaking which is experiencing temporary difficulties but is capable of becoming profitable again, possibly after a reorganisation. However, when injections of capital by a public investor disregard any prospect of profitability, even in the long term, such provision of capital must be regarded as aid within the meaning of Article 107 of the TFEU ([49]).

(221) It must also be pointed out that in order to examine whether or not the State has adopted the conduct of a prudent investor operating in a market economy, it is necessary to place oneself in the context of the period during which the financial support measures were taken in order to assess the economic rationality of the State's conduct, and thus to refrain from any assessment based on a later situation ([50]). Thus, for the purposes of showing that, before or at the same time as conferring the advantage, the Member State took that decision as a shareholder, it is not enough to rely on economic evaluations made after the advantage was conferred, on a retrospective finding that the investment made by the Member State concerned was actually profitable, or on subsequent justifications of the course of action actually chosen. Consequently, the Commission may refuse to examine the evidence produced [which] has been established after the adoption of the decision to make the investment in question ([51]).

Multiannual loss coverage strategy

(222) The Italian authorities and SEA maintain in their observations that, while the decisions to cover the losses were formally taken on an annual basis, the multiannual strategy to absorb the losses over the period needed for restructuring could not have been discussed afresh every year, and the results could be evaluated only over a multiannual period. The Commission observes that five business plans were submitted to it, some of them relating to overlapping periods, with a duration of no more than five years. Considering that the drafting of a new business plan generally involves an assessment of the company's business strategy, in order to determine whether to pursue it

([48]) See in particular Joined Cases C-278/92, C-279/92 and C-280/92 Spain v Commission [1994] ECR I-4103, paragraphs 20-22.
([49]) See for example Case C-303/88 Italy v Commission [1991] ECR I-1433, paragraphs 21 and 22.
([50]) *Stardust Marine* judgment, paragraph 71.
([51]) Judgment of the Court of Justice in Case C-124/10 P *Commission* v *EDF*, paragraphs 85 and 104.

further or to change it, the Commission considers that the strategy adopted with regard to SEA Handling could indeed have been reviewed at any time before a new plan was adopted, in order to take market developments into account.

(223) The Italian authorities and SEA have stated that the decision to cover future losses was initially made in 2002 and then a second time in 2007, when, in view of the failure to reach the expected targets, the decision was taken to review the initial strategy calling for the coverage of losses, after which it was decided to proceed as originally planned. Essentially, they seem to present the measures in question as two injections of capital which were to be made in annual payments but which were decided in 2002 and 2007.

(224) In their letter of 14 September, the Italian authorities stated that the de-hubbing of Alitalia in 2007 had grave repercussions on the activity of SEA Handling. Those repercussions on the firm's financial performance were exacerbated by the economic downturn and led SEA to reassess the viability of the hub model and evaluate the possibility of selecting a different business model. According to the Italian authorities, rather than choosing to outsource ground handling services, SEA in the last analysis decided to create a new business model, namely its 'self-hub' or 'virtual hub' model, which was merely a straightforward development of the previous model. The new model required tight control of ground handling activities. This demonstrated the rationality of SEA's decision to continue covering the operating losses of its subsidiary SEA Handling in order to return its ground handling business to profitability. The Italian authorities therefore contended that the review of SEA's strategy with regard to its subsidiary was fully justified by the unforeseen external circumstances, and in no way compromised SEA's objective of returning its ground handling business to long-term profitability.

(225) The Commission acknowledges the existence of a multiannual strategy for the coverage of losses by the Italian authorities (in accordance with the commitment given by the Municipality of Milan to guarantee the financial stability of SEA Handling, and line with the evidence set out above for the imputability of those decisions to the Municipality), but it considers that such a strategy does not correspond to the conduct of a prudent private investor.

(226) While it may take several years for any restructuring process to bear fruit, a prudent private investor would not enter blindly into a multiannual commitment, but would instead try to decide each year whether to inject fresh funds into the company in the light of the results of the restructuring process and the prospects for future viability. In the present case a private investor would certainly have reassessed the strategy in 2003 or 2004, when it was evident that the objective of a return to profitability in 2005 was not going to be achieved, or in any event in 2005, when it proved that that objective had not been achieved. Even if a private investor had embarked on a long-term loss coverage strategy, that investor, always supposing there were no binding legal restrictions, would have reviewed the strategy whenever asked to provide funds to eliminate SEA Handling's losses ([52]).

(227) More specifically, as SEA made clear in its observations, the failed negotiations with […] in 2002 significantly compromised the possibility of achieving the objective of returning SEA Handling to profitability by 2005. But after SEA's board of directors rejected the offer on 10 September 2002, just a few months after SEA Handling was set up, no changes to the loss coverage strategy were ever considered.

(228) Second, a decision as important as an injection of capital, which is subject to the approval of the general meeting, cannot be regarded as merely a step in the implementation of a general decision to cover future losses.

(229) Third, the decisions to cover future losses over several years were not mentioned in the strategic business plans of SEA Handling or SEA. SEA's governing bodies did not enter into any formal, binding commitment based on a business plan providing for stated capital injections by SEA over a stated number of years ([53]). The decisions taken in 2002 and 2007 were concerned at most with the aspect of SEA Handling's restructuring, rather than with the coverage of losses over multiple years. A private investor would in any event not have given a commitment to cover losses over several years without having at least a preliminary estimate of the total cost.

([52]) Judgment of the General Court in Case T-358/94 Air France v Commission [1996] ECR II-02109, paragraph 79.

([53]) The only commitment that might be so interpreted is that given to the Municipality in the agreement of 26 March 2002, whereby the Municipality confirmed that SEA would ensure that costs/revenues and the general economic framework remained balanced. That commitment does not refer to precise amounts indicated in a specific business plan, and the Italian authorities maintain that it is not legally binding.

(230) It follows that aid was granted in each of the years under investigation, and in particular on the dates when SEA decided to increase the capital of SEA Handling, primarily in order to cover its losses, and undertook binding legal obligations in that respect ([54]).

(231) However, in analysing the injections of capital, the Commission cannot ignore the preceding injections. The measures were closely interlinked. According to the Italian authorities, they formed part of a single strategy. They pursued the same objective, namely to offset the losses of SEA Handling in order to ensure the firm's survival and restore its profitability. From a chronological perspective, too, they formed a continuous process, in that they were adopted each year, in succession, to respond to the ongoing difficulties of the recipient ([55]).

(232) Given the situation of difficulty in which SEA Handling found itself since it was set up, the Commission considers that a prudent private investor would have evaluated the risk that, from the first injection of capital, the measures might constitute illegal and incompatible State aid, and would therefore have studied the impact which the possible recovery of such aid would have on the profitability of its investment. The Italian authorities have never provided any evidence to show that such an assessment was performed.

Capital injections in 2002

(233) It is not contested that when the first capital injection took place SEA Handling was a firm in difficulty within the meaning of the 1999 Restructuring Guidelines.

(234) Points 16 and 17 of those Guidelines state that where capital is provided by public authorities to an enterprise that is in financial difficulties, it is likely that the funding will constitute State aid (it being extremely difficult for such an investment to generate a profit that would be acceptable to a prudent private investor operating in a market economy, considering the risks involved). Such capital injections must therefore be reported to the Commission in advance in order to be authorised as State aid.

(235) In 2002 the Italian authorities ignored the indications in the 1999 Restructuring Guidelines, as they did in the case of the later capital injections too, and chose to carry out the injections even though they do not seem to have based their decision on a detailed business plan showing that SEA Handling was capable of reversing its fortunes and returning to profitability within a reasonable time ([56]).

(236) The Commission considers that a market investor would not have carried out the 2002 capital injections without a sufficiently detailed business plan based on sound, reliable hypotheses, which precisely described the measures needed to restore the profitability of the company, analysed the various possible scenarios, and demonstrated that the investment would generate a return that satisfied the investor (taking account of the intrinsic risk) in terms of dividends, increased share value, or other advantages.

(237) Accordingly, the first capital injections, in 2002, do not seem to satisfy the market-economy private investor test, and conferred an advantage on SEA Handling that it would not have received in normal market conditions.

Context at the time the decisions were taken

(238) Regarding the context in which the aid was granted, which the Commission must take into account when it applies the private investor test, the Commission will now set out its own approach, in response to the points raised by the Italian authorities and by SEA.

(239) First, with regard to the impact on SEA's decisions of Italy's specific regulatory framework and the particularly high competitive pressure it generated, the Commission is responsible for ensuring that the objective of Directive 96/67/EC, namely to create a single market for ground handling services in the European Union by liberalising the sector, which entails greater competition between operators, is not compromised by the granting of State aid that might distort competition. It follows that measures adopted by a Member State to implement the Directive are no evidence that financial support granted to a given operator in order to offset the effects of a more competitive economic environment complies with the prudent private investor test. But in this Decision, and more especially in its analysis

([54]) Judgments of the General Court in Case T-109/01 Fleuren Compost v Commission [2004] ECR II-127, paragraph 74; Joined Cases T-362/05 and T-363/05 Nuova Agricast v Commission [2008] ECR II-297, paragraph 80; and Joined Cases T-427/04 and T-17/05 France and France Télécom v Commission [2009] ECR II-4315, paragraph 321.

([55]) Judgment of the General Court in Case T-11/95 BP Chemicals v Commission [1998] ECR II-3235, paragraph 171. In light of the previous indications in this Decision, the Commission will assess the compatibility of the measure investigated with the private investor test from an overall perspective, but will focus on specific times when it judges it necessary in order to analyse the arguments submitted or for other reasons.

([56]) For an analysis of the 2002-2006 consolidated business plan see paragraphs 269-271.

of the course of conduct that a private investor would have adopted in a situation such as that of SEA, the Commission will take into account of the fact that Italy had opted for full liberalisation of the ground handling market, and that ENAC had authorised 84 providers to operate at Malpensa and Linate.

(240) Many other Member States have opted for a similar form of liberalisation (Denmark (Copenhagen), Spain, Ireland (Dublin), UK (London), France (Paris)).

(241) The applicable regulatory framework is in any case the same for all providers in the sector in Italy, the number of which is high, in SEA's opinion, with 84 providers authorised to operate.

(242) The Italian authorities have not argued that the services are services of general economic interest which the market would not be able to guarantee.

(243) Irrespective of the fact that SEA opted for a legal separation of activities (and, therefore, of accounts), Article 4 of Directive 96/67/EC still applies: it states that operators 'must rigorously separate the accounts of their ground handling activities from the accounts of their other activities, in accordance with current commercial practice', and prohibits 'financial flows between the activity of the managing body as airport authority and its ground handling activity'. This separation of accounts and prohibition of financial flows between the managing body and the ground handling entity are aimed at guaranteeing suitable conditions for developing effective competition in ground handling markets, by ensuring that the ground handling activity of vertically integrated operators does not receive any specific advantage over other operators.

(244) Coverage of losses by the airport manager involving financial flows between the activity of the manager and the ground handling business runs counter to Directive 96/67/EC and its objectives. Consequently, the fact that SEA has opted not just for an accounting separation but for a legal separation of its areas of activity does not change the Commission's finding that there is an unfair advantage conferred on SEA Handling.

(245) Regarding the affirmation that SEA is obliged to guarantee the provision of all ground handling services, the Commission observes that this 'legal obligation' means only, as the Italian authorities themselves indicate, that the responsibility may be exercised by the airport itself, or that the airport may coordinate the operations of outside providers. As the Commission said in paragraph 95 of the opening decision, SEA is in no way obliged to guarantee such provision either directly or through its subsidiary SEA Handling. The general responsibility of the airport manager in the event of a malfunction cannot, therefore, be invoked to show the absence of alternatives to covering the losses of SEA Handling. In the second place, even accepting SEA's claim that the ground handling business generally offers low profit margins and low levels of profitability, the Commission cannot accept that the market context proper justified the capital injections for purposes of the market-economy private investor test, especially given the scale of the losses incurred by SEA Handling throughout the period in question. On the contrary, on p. 5 of the 2007-2012 strategic plan it is confirmed that the most efficient airport operators in Europe have subcontracted ground handling activities. This same point is reiterated on p. 7 of the 2009-2016 strategic plan. It is confirmed on p. 28 of that document that the market tendency in 2001 was towards the subcontracting of ground handling services. This evidence contradicts the idea that vertical integration between the airport operator and the ground handling service provider is essential in order to guarantee quality, and that in view of the meagre profit margins in ground handling it was reasonable not to subcontract.

(246) In particular, in a market that offers such low profit margins, rather than covering SEA Handling's losses SEA should have taken far more radical measures to increase SEA Handling's efficiency, significantly reducing staff costs, which according to the Italian authorities themselves make up a considerable part of the cost structure of a company in this sector, a sector subject to intense competitive pressure.

Alternatives to coverage of SEA Handling's losses

(247) The Commission considers that SEA's view that there were no alternatives to the restructuring of SEA Handling and the coverage of its losses does not correspond to the conduct of a private investor in a market economy. Possible alternatives included a full or partial outsourcing of services, or the establishment of a strategic alliance through the transfer of part of SEA Handling to a strategic partner. Moreover, as pointed out in the previous paragraph, there was nothing to prevent SEA from adopting more radical restructuring measures aimed at increasing the efficiency of SEA Handling within a timeframe acceptable to a private investor.

(248) Regarding the possibility of a transfer, the Commission cannot pass judgment on the efforts made by SEA to establish such an alliance, which might have allowed it to benefit from synergies deriving from its integration into an international network. The Commission notes, however, that in its comments SEA mentioned only two attempts at partial sale: the one that led to the failed negotiations with […] in 2002, and the one that was initiated but not concluded in 2007-2008. Since then the possibility of a sale seems to have been made dependent upon a recovery of SEA Handling's profitability by other means. The Commission considers the evident lack of interest among private companies in investing in SEA Handling as an indicator of the company's lack of solid prospects of profitability.

(249) With regard to the possible outsourcing of all or part of the ground handling activities, the Italian authorities have argued in the first place that no operator wanted to take over the business. The Commission observes that the State aid was reported by […], and that […] also expressed its opposition to the measures.

(250) Additionally, neither that statement nor the more specific claim that potential outside operators are interested only in certain more profitable services ('cherry picking') is based on a firm observation of a manifest disinterest, for example following a tender procedure initiated by SEA for the provision of the services in question. In other words, this claim is not supported by any specific evidence, while a number of operators are authorised to offer their services in Italy and in particular at Malpensa and Linate airports.

(251) Regarding the capacity of outside operators, the Italian authorities have insisted that there were no operators capable of guaranteeing the level of quality required by SEA's commercial model, namely that of a 'hub' or 'self-hub' airport. SEA considered that it needed a provider that was able to provide all of its ground handling services, and that this was impossible because the other operators on the market did not have the material resources, the economic resources or especially the human resources required to ensure the entire range of services.

(252) First, the Commission points out that SEA is wrong to suppose that the available supply of ground handling services is limited to that of outside parties present at any given moment in Malpensa and Linate airports, and does not include potential supply by any other providers also authorised to work there. SEA's somewhat vague statements concerning the allegedly negative economic situation of other providers active at the Milan airports or the level of the resources they actually use at those airports are in no way relevant. The marginal presence of providers actually working at the Milan airports is only one example of the supply potentially available and able to enter the market. In addition, the fact that the outside providers currently operating at the Milan airports do not cover all ground handling services does not mean judgments can be made as regards their capacity to do so.

(253) Second, the Italian authorities and SEA have not clarified why SEA needed to transfer all of its ground handling services to one operator. While it may be accepted that some activities may be less profitable, these activities could reasonably have been transferred to an operator that could take advantage of international economies of scale.

(254) Third, regarding the actual capacity of outside operators to provide all ground handling services, the Commission rejects the claim that no operator had the necessary resources. According to SEA, 84 providers are authorised to operate at Linate and Malpensa. And, as already mentioned, it was certainly feasible to outsource part of the activities, rather than all of them.

(255) Fourth, SEA has not specifically shown that an outside operator would not be able to satisfy the quality requirements judged essential for SEA's commercial model to function correctly. The Commission does not share the opinion that the quality of service requirement cited in Directive 96/67/EC and in the Italian legislation would apply in this context.

(256) Concerning SEA's economic justification, which seeks to demonstrate the inadequacy of outsourcing certain ground handling services, because the airport manager has ultimate responsibility for guaranteeing continued services in cases of emergency or unforeseen events, the Commission has reservations on various points.

(257) First of all, SEA has submitted dubious calculations to support its theory. These put the number of full time equivalent (FTE) staff units at SEA Handling assigned to emergency management at a very high level. In 2003, SEA estimates that the figure was no less than 336 FTE, at a total cost of EUR 9,9 million and equivalent to 1,8 % of SEA Handling's total FTEs. Clearly the actual cost incurred by SEA Handling was far less, since those staff were also — if not primarily — assigned to other tasks. However, to calculate the total cost which SEA would have to bear as airport manager in 2003 to cover this activity, SEA suggested multiplying that number of FTEs assigned to continued service and emergency management by a factor of 1,7, thus reaching the conclusion that SEA required 569 full-time workers costing a total of EUR 20,6 million. SEA concluded that the difference between these two amounts (EUR 20,6 million–EUR 9,9 million) represented the effective gain from the non-transfer of SEA's activities. The

Commission considers the factor of 1,7 to be arbitrary, since no justification has been provided, whereas it was up to SEA to show that this hypothetical cost had been calculated correctly. The Commission also estimates that the number of FTEs used to calculate the total cost incurred by SEA is completely unrealistic.

(258) The Commission considers, rather, that the estimate of the cost incurred by SEA Handling should take into account the actual cost usually billed by SEA Handling to SEA, and a more realistic estimate of the number of SEA Handling FTEs assigned to such duties based on the average number of emergency situations, unforeseen events and cases of continued service that took place over the course of a year.

(259) Second, the calculation takes no account of the substantial costs incurred by SEA as a result of the coverage of losses, which could have been avoided by outsourcing some or all of the ground handling activities to a more competitive operator. The outsourcing of some of the continued service activities might have entailed potentially higher costs to SEA, on account of the synergies that may be achieved as a result of the combination of those services with other in-house activities, but the overall gain from such outsourcing was potentially positive, so that this argument does not by itself show that there was no solution available other than covering SEA Handling's losses, as SEA contends in its comments.

(260) […] envisaged disinvestment from SEA Handling in 2010 following the de-hubbing of Alitalia. According to […], SEA's primary objective was to develop Malpensa as a main hub (p. […]) and to identify a new airline within five years (p. […]). Disinvestment from SEA Handling was crucial to the attainment of this objective, and represented a milestone in the reorganisation of SEA in order to place it among the most profitable air transport operators (p. […]). SEA itself therefore saw no need to keep SEA Handling in the group, either for managing Malpensa airport as a hub or for improving the overall financial standing of SEA.

(261) In light of the above, the Commission concludes that while SEA seems to have made efforts to establish an alliance with a strategic partner capable of having a significant impact on restoring SEA Handling's profitability, the outsourcing of all or part of its activities to outside operators was an economically advantageous option which a private investor would necessarily have considered, and, if appropriate, pursued, rather than continuing to pay heavy operating losses over many years. Yet none of the documents submitted shows that there was any reflection on the future of SEA Handling over the course of the entire period in question.

The selection of the SEA group's commercial model

(262) The Italian authorities have made the general statement that SEA's decision to maintain a hub airport system requires that these services be provided directly by the airport manager, but this argument does not seem to be supported by an analysis aimed at determining why, when set against the potential earnings from the existence of the hub, it was economically advantageous to SEA to compensate some EUR 360 million in losses. Apart from general claims, the Italian authorities have not submitted a single document showing how that choice was arrived at.

(263) More specifically, regarding the argument that covering SEA Handling's losses provided the most efficient possible basis for SEA's chosen hub model, because of the complementary nature of ground handling and airport management activities, the Commission observes that, without judging the wisdom of the decisions taken by the SEA group, this constraint on SEA Handling's strategy (besides being contradicted by the observation that Europe's best-performing large airports/hubs have transferred their ground handling services, and by the business plans mentioned in paragraphs 281-282 and 283-286 ([57])) is essentially based only on a presumption that no outside operator would be able to provide sufficient quality. SEA has not clarified the level of quality it required, or the impact that an insufficient level of quality might have had on the functioning of the airport and its revenues. This is even more surprising considering SEA's claim that inadequate provision of ground handling services by outside parties would have damaged SEA's reputation as an airport operator, a fact which could easily have been confirmed by a market study (paragraph 106 of SEA Handling's letter of 21 March 2011). Given the lack of a clear assessment of the damage that might have been caused to SEA's image or reputation if all or part of its ground handling services had been subcontracted, the Commission cannot accept the argument that SEA's conduct — in systematically covering SEA Handling's losses — was economically rational and necessary in order to avoid such damage. Moreover, in application of Article 15 of Directive 96/67/EC, a Member State may impose rules of conduct on suppliers of ground handling services in order to ensure the proper functioning of the airport (where appropriate on a proposal from the airport), even if those suppliers are from outside the airport. In any case, neither SEA nor Italy has provided any concrete proof that the hub model could not have been implemented by outsourcing all or part of the ground handling services.

([57]) 2007-2012 strategic plan, p. 5, and 2009-2016 strategic plan, p. 9.

(264) Rather, […] confirms SEA's intention to make no further investment in SEA Handling, since its investment is considered a non-strategic holding for the purpose of ensuring that Malpensa will return to its hub status following the de-hubbing of Alitalia.

The restructuring of SEA Handling and SEA's objectives

(265) The Italian authorities cite the *ENI-Lanerossi* judgment, which states that a private shareholder may reasonably subscribe the capital necessary to secure the survival of an undertaking which is experiencing temporary difficulties but is capable of becoming profitable again, possibly after a reorganisation. It must therefore be accepted that a parent company may also, for a limited period, bear the losses of one of its subsidiaries in order to enable the latter to close down its operations under the best possible conditions. Such decisions may be motivated not solely by the likelihood of an indirect material profit but also by other considerations, such as a desire to protect the group's image or to redirect its activities. However, when injections of capital by a public investor disregard any prospect of profitability, even in the long term, such provision of capital must be regarded as aid within the meaning of Article 92 of the Treaty, and its compatibility with the common market must be assessed on the basis solely of the criteria laid down in that provision ([58]).

(266) The Italian authorities submit in particular that the Commission should assess decisions to cover a subsidiary's losses on the basis not only of the likelihood of an immediate profit, but on other considerations that may justify covering the losses of a subsidiary which is capable of becoming profitable again after a process of restructuring.

(267) SEA contends that offsetting the losses of SEA Handling is justified, first, by the presence of a strategic plan and restructuring programme with good prospects of long-term profitability, and, second, by considerations other than mere financial profitability.

(268) Concerning the first argument, the Commission considers that the business plans for SEA Handling that were supplied to it are not sufficiently detailed to justify such a decision by a private investor in a market economy. More specifically, the plans are not the 'turnaround' plans that a prudent private investor would require before undertaking such substantial injections into the capital of a company that had been in economic difficulties since it was set up. The plans are not based on an in-depth audit of the causes of the difficulties and of the measures needed to resolve them. They are not based on realistic forecasts regarding the development of SEA Handling's activity or of the sector, nor do they contain an analysis of alternative scenarios, which a diligent private investor would have expected in a similar situation.

The 2002-2006 consolidated business plan

(269) Specifically, the 2002-2006 consolidated business plan approved in 2001 envisaged that SEA Handling would return to profitability by 2005. But that plan covered the entirety of SEA activities, and did not include a detailed description of the measures that SEA should take in order to guarantee the profitability of SEA Handling.

(270) The plan lists the measures to be implemented to improve workforce productivity by 20 % by 2006 (p. 17), but does not evaluate the effect of such a rise in productivity on the company's overall financial performance. The Commission considers that the plan cannot be seen as based on credible hypotheses, since it does not include any specific measures for addressing the structural causes of chronic losses in ground handling, namely excess labour costs (p. 23). On the contrary, the document provides for a rise in the cost of labour in ground handling in that period (Annex 3, p. 13). It also forecasts a 37 % increase in revenue from ground handling services (p. 30) without giving any realistic justification, particularly considering the presence of other ground handling operators at the Milan airports and the growing competition in the sector. The Commission observes that in its report and accounts at 31 December 2003 SEA acknowledged that SEA Handling's market share had fallen as a result of competition.

(271) As the Commission observed in paragraphs 82-85 of the opening decision, the economic performance of SEA Handling on the basis of its 2002-2006 consolidated business plan and 2003-2007 business plan was not satisfying.

The 2003-2007 business plan

(272) The opening decision clearly asked the Italian authorities to submit 'the 2002 business plan for SEA Handling, with any subsequent amendments, or any document concerning the strategy and return to profitability of SEA Handling'. In their observations the Italian authorities did not initially react. SEA, as an interested party, ultimately submitted a document entitled 'Piano d'impresa 2003-2007 di SEA Handling' (2003-2007 business plan for SEA Handling). From its title and its form, however, this document is more a presentation of the business plan already referred to which outlines the main general hypotheses for the return to profitability envisaged in the company's forecasts for

([58]) Judgment of the Court of Justice in C-303/88 Italy v Commission [1991] ECR I-1433, paragraphs 21 and 22.

2005. The Commission considers that in substance this presentation reproduces the policy for SEA Handling established at the SEA group level in the SEA 2002-2006 consolidated business plan, but does not explain with sufficient precision the measures to ensure profitability which a private investor would logically have expected.

(273) The 2003-2007 business plan describes a situation that is highly critical for SEA Handling (excessive labour costs, substantial organisational imbalances, insufficient technological innovation and a failure to take advantage of certain potential revenue items, p. 1), which could result in a loss of market share and of which SEA Handling was well aware (p. 15); but the measures for the reduction of labour costs are essentially limited to brief mentions of a voluntary redundancy incentive policy, an increase in temporary staff and a reduction in overtime. SEA estimated that this would reduce staff costs by 3,1 % between 2003 and 2007.

(274) According to the information provided by the Italian authorities, labour costs amounted to 103,7 % of SEA Handling's turnover in 2002, and 94,9 % in 2003, whereas the corresponding figure for independent operators was less than 70 % on average; but SEA Handling set itself the target only of reaching around 75 % by 2005 and maintaining that level thereafter.

(275) In addition, SEA Handling envisaged that this improvement would be brought about primarily by a 25 % rise in turnover between 2003 and 2007 (pp. 5 and 6 of the business plan), and not by a reduction in staff costs, which was estimated at only around - 3,1 % between 2003 and 2007 (with a slight increase in labour costs in the period 2004-2007).

(276) The Commission considers that, given the scale of the restructuring required, a private investor would have focused its efforts to return the company to profitability on internal measures over which it would have the most control, essentially related to cutting labour costs, which at the time were higher than turnover, rather than anticipating an increase in prices and demand, factors over which SEA Handling had far less control.

(277) The Commission also considers that that the contract signed with Alitalia for the 2001-2005 period envisaged a 7 % increase in prices in 2004 and in 2005, a rise which later proved excessive and was followed by reductions in 2006 and 2007 against a background of falling prices due to a more competitive environment. Given that the liberalisation of the sector could be expected ultimately to result in a reduction in prices, the Commission considers that SEA cannot reasonably claim that such a reduction was an 'unforeseeable negative event'. The 2003-2007 business plan was therefore not based on realistic prospects. Moreover, the Commission takes the view that a private investor would have anticipated the change in the competitive environment brought about by the liberalisation of the sector, and would not have embarked on a strategy that made a return to profitability depend primarily on an increase in turnover.

(278) The Commission thus considers that the achievement of the objective of returning to viability by 2005 was unrealistic if the only measures taken were those judged necessary by SEA according to the indications in its 2003-2007 business plan and 2002-2006 consolidated business plan.

(279) In response to the Commission's request of 11 July 2011, the Italian authorities were not able to provide the minutes of the meeting of the board of directors of SEA Handling that had approved the measures described in the SEA Handling business plan. Instead, the Italian authorities sent the Commission minutes of the meeting of the board of directors of SEA held on 23 July 2003, at which a consolidated business plan was approved for the SEA group. On that occasion, according to the extract from the minutes provided, the 2003-2007 business plan for SEA Handling was only presented, and consequently was not approved.

(280) Regarding a possible amendment to the initial business plan, or the drafting of a subsequent business plan, the Commission concludes, on the basis of the information provided by the Italian authorities in response to its request of 11 July 2011, that thereafter the need for a fresh recovery programme was discussed only at the board of directors meeting on 21 December 2006, when it was decided that the chairman would draw up a detailed restructuring plan. On that occasion there was no mention whatever of any restructuring plan currently being implemented.

The 2007-2012 strategic plan

(281) The strategy planned by SEA was subsequently set out in a document drafted by an external consultant which was produced at the meeting of SEA Handling's board of directors on 31 May 2007. This document, entitled 'Executive Summary — Linee guida del piano strategico 2007-2012 del gruppo SEA — 11 maggio 2007' (Executive Summary: Guidelines for the SEA group's 2007-2012 strategic plan, 11 May 2007), is an external consultant's presentation of possible development scenarios for the SEA group, and gives only a brief account of the situation of SEA Handling, on just two pages (pp. 8 and 12), merely indicating the absolute need to return it to profitability by 2012. No specific

measures for returning the company to profitability are provided for. The Commission therefore disputes the Italian authorities' statement that this document sets out the strategy of the SEA Group for the 2007-2012 period in three phases. The only strategic measure discussed at the meeting was the reorganisation of the production model with a brief indication of certain recovery measures.

(282) Moreover, as already pointed out, the plan confirms that non-vertically integrated operators provide services that are better in economic terms than those of airport operators that have kept control over ground handling operators.

The 2009-2016 strategic plan

(283) According to the Italian authorities, when Alitalia de-hubbed Malpensa airport in 2007, SEA considered abandoning its hub model in view of the departure of the hub carrier on which the model was based. Consequently, a new strategic plan drawn up by an external consultant ('Piano strategico 2009-2016') was presented to the SEA board of directors, which approved it on 15 July 2008. This document displays the same characteristics as its predecessor, giving no details of measures related to the planned recovery of SEA Handling except for a brief description of aspects relating to a contractual review and managerial improvements and also emergency procedures such as the extraordinary layoff fund (*cassa integrazione*).

(284) Contrary to the claims of the Italian authorities, SEA's primary objective according to this plan is to develop Malpensa as a main hub by identifying a new hub carrier 'within five years' (p. 5). According to the SEA Handling disinvestment plan, it is essential to achieve this objective by 2010 (pp. 12, 35 and 37). The Commission observes that the plan does not contain any reference to the virtual hub model, nor does it say that the development strategy is based on a new business model and necessarily involves the vertical integration of SEA Handling. The minutes of the meeting of the board of directors of SEA Handling on 13 June 2008 likewise confirm that SEA's objective at the time was not to become a virtual hub, but to attract a new hub carrier. The minutes of the SEA board of directors meeting of 15 July 2008 also describes disinvestment from SEA Handling by 2010 as a key factor in the plan's sustainability.

(285) The Commission also observes that the document 'VIA Milano', submitted by the Italian authorities on 28 June 2012, includes a description of the virtual hub model. The document suggests that SEA has been pursuing this strategy since 2011. But there is no suggestion here either that the virtual hub model requires the vertical integration of the airport and ground handling operators.

(286) The plan confirms that from 2001 onward Europe's leading airport operators have gradually left the ground handling market, with the result that new, independent operators have entered it (p. 28).

The 2011-2013 business plan

(287) Finally, SEA states that on 27 June 2011 its board of directors approved a document entitled 'Piano d'impresa di SEA 2011-2013' (SEA business plan 2011-2013), which among other things highlighted 'the need to continue with the strategy of improving the efficiency of ground handling'. The Commission observes, however, that this document contains only financial projections, and makes no specific mention of any measure in reference to SEA Handling.

(288) The Commission also points out that the business plan indicates that the charges related to labour costs borne by SEA Handling had remained virtually unchanged since 2009 (see table on labour costs).

(289) The Commission finds, therefore, that the Italian authorities have been unable to provide it with sufficiently detailed business plans for SEA Handling, or any other documents that might describe the restructuring strategy and its implementation over the period in question, much less any documents that might show that this strategy had from the outset envisaged the necessity or possibility of covering SEA Handling's operating losses for a stated period and for stated amounts. The Commission therefore considers that the Italian authorities have not been able to produce concrete evidence of a restructuring strategy for SEA Handling that in the eyes of a prudent private investor would justify the temporary coverage of its losses with a view to returning it to profitability. This is surprising in the present case because a private operator, looking at a company that had been accumulating losses since it was set up some years ago, would have asked for an in-depth audit and for precise measures to be taken before investing resources in the company.

(290) The Commission cannot accept SEA Handling's argument that the fact that SEA Handling had almost reached break-even point in 2011/2012 demonstrates the rationality of SEA's strategy of covering SEA Handling's losses over the whole time, and thus shows that the capital injections satisfied the market-economy private investor test. Given that that SEA Handling's losses had been covered continuously for nearly 10 years, it is not surprising that SEA Handling should finally have returned to profitability. Any undertaking that received the same financial support would be able to return to profitability if it took just modest restructuring measures. But this prospect would not be enough to satisfy a private investor, who would require at least a projection showing that the expected return from the strategy of medium- and long-term loss coverage — in terms of dividends, increased share value, avoidance of damage to image, etc. — would exceed the capital injected to offset such losses. The Commission observes that none of the business plans submitted by Italy provides forecasts which try to show that the strategy of covering losses over such a long period of time would be more economically advantageous to SEA than disinvestment from SEA Handling, or which try to reduce the restructuring period in order to return to profitability in a reasonable time and to minimise losses.

(291) Given the repeated losses of SEA Handling each year over the period of reference, the Commission considers that SEA Handling was loss-making for a time that was too long to be considered 'a limited period' within the meaning of the judgment in *ENI-Lanerossi* ([59]). SEA Handling has been making losses since it was set up in 2002, and at best may become profitable only in 2012, according to SEA's forecasts in 2011. The decisions to cover the losses were taken year by year, and the repeated annual losses did not lead to a change in SEA's strategy or to more radical restructuring measures.

(292) On the second argument, regarding considerations other than mere financial profitability, the Commission, for the reasons already stated above, disputes the concerns cited by SEA regarding the allegedly insufficient level of quality that an outside provider would have been able to provide, which it is argued would have had a negative impact on SEA's development and general performance and might have rendered SEA liable for any malfunction.

(293) As already observed, the Commission considers that the Italian authorities and SEA have not provided details of the potential damage to SEA's image or of the damage that passengers might have suffered. They did not quantify any such loss even after the opening decision. And yet SEA acknowledged that such a loss could easily have been confirmed by a market study. The Commission takes the view, therefore, that the absence of any evaluation of the damage to SEA's image, or of its potential liability, or of the prospects of an indirect long-term return, is especially detrimental to any attempt to show that the measures are compatible with the prudent private investor test given the scale of the capital injections involved. A prudent shareholder would have carried out an economic evaluation of these risks and prospects before paying out a total of EUR 359,644 million ([60]).

(294) It has been argued that the goal of maximising the long-term profits of the SEA group has to prevail over the financial profitability of SEA Handling, but this ignores the fact that if SEA had not systematically covered its subsidiary's losses its profits would have been much greater. Moreover, the Italian authorities have submitted no evidence that might show that in the long term SEA would have achieved greater profitability by pursuing its strategy of covering the losses rather than by taking more drastic restructuring measures or outsourcing all or part of its ground handling services.

(295) In the terms used in the *ENI-Lanerossi* judgment, the Commission considers that SEA Handling was not 'experiencing temporary difficulties' but had a serious structural problem, and that its losses were not covered by SEA for 'a limited period'. Moreover, if the losses were borne 'in order to enable [the subsidiary] to close down its operations under the best possible conditions', it has to be observed that since 2001 SEA has initiated only two competitive bidding procedures, or at least that the optimal conditions have not been achieved within a reasonable time. In any event, that objective cannot by itself demonstrate that the measures comply with the prudent private investor test.

(296) In conclusion, the Commission finds that the business plans submitted to it are not based on realistic forecasts of the development of SEA Handling's business or of the sector, and do not provide the analysis of alternative scenarios that a diligent private investor would have demanded in a similar situation.

([59]) Judgment of the Court of Justice in Case C-303/88 *Italy* v *Commission* [1991] ECR I-1433, paragraph 21.
([60]) See the judgment of the General Court in Case T-565/08 *Corsica Ferries* v *Commission*, paragraphs 101-108.

The economic performance of SEA Handling

(297) While the economic performance of SEA Handling after the decision to cover its losses for a given year do not allow a judgment to be made with regard to compliance with the private investor test, its results prior to such a decision, and particularly the direction in which they were moving, do clarify the factual context in which the decision was taken. The correlation between the restructuring measures applied to SEA Handling and the results they produced during the period in question would necessarily have at least influenced a private investor's decision whether or not to continue covering the company's losses. They therefore need to be analysed in this light.

(298) The Italian authorities and SEA implicitly acknowledge this principle when the say that the positive progression of the main economic results of SEA Handling during the period 2003-2004 was, in their opinion, encouraging, and showed that a return to profitability was possible. In the opening decision, however, the Commission pointed out that between 2003 and 2005, the company's losses remained at over EUR 40 million; its gross operating margin remained negative; its unit labour costs rose 7,6 %; total costs fell only by around 3 %; and income increased by around 4,5 %.

(299) Leaving aside the Commission's negative assessment of the level of precision of the restructuring plans submitted by the Italian authorities, it should be noted that the indicators of sound economic development recorded over the course of the period, particularly those related essentially to the internal measures adopted and not based on external factors over which the company had no influence, allow a direct evaluation to be made of the scale of the restructuring measures actually implemented. This is the case, for example, of a reduction observed in staff costs resulting from a rise in productivity, a reduction in unit labour costs and a reduction in employee numbers.

(300) On the other hand, the Commission considers that indicators of quality, such as shifts in waiting times for arriving baggage and the punctuality of calls managed by SEA, while useful for evaluating the competitiveness of the services offered, cannot be used to judge the scale of the restructuring measures.

(301) Regarding the actual economic results achieved, the Commission refers to the analysis of the graphs and tables in Section 2.4.

(302) The Commission points out that according to the data shown in table 3 a 22 % rise in productivity was observed between 2004 and 2010. SEA has stated that this improvement was the result of better and more flexible use of human resources, outsourcing of low-productivity services (e.g. cabin cleaning), and better staff supervision (particularly through a reduction of absentee rates).

(303) SEA claims that SEA Handling failed to achieve its goal of profitability by 2005 or at the latest by 2007 mainly because of a loss of income, deriving in particular from the reduction in prices, including those paid by Alitalia from 2006 onward, and from the rise in unit labour costs. Finally, SEA states that the lower-than-expected level of traffic had repercussions on income generated between 2002 and 2007.

(304) Regarding labour costs, the Commission observes that the unit cost of labour rose nearly 10 % between 2003 and 2010. SEA claims that its limited capacity to achieve significant reductions in its operating costs was limited. It says that the power of the unions in collective bargaining negotiations and their political role in Italy restricted its room to manoeuvre in the short term. Staff cuts were substantial, but they were not sufficient to offset the rise in unit labour costs before 2008, nor to significantly reduce labour-related costs (– 38 % between 2008 and 2010). The Commission takes note here of the minutes of the board of directors meeting of 21 December 2006, at which one of the members pointed out that the situation of SEA Handling was still 'very alarming'. The fact that from 2008 onward SEA Handling managed to reduce its labour costs appreciably shows that considerable efforts were made in this area. But in the context of the case that fact does not show that the capital injections complied with the private investor test. In particular, the Commission has already observed that the capital injections carried out from 2007 onward cannot be examined without considering the preceding injections. Similarly, the Commission also pointed out that they were not based on financial analyses and business plans comparable to those that a private investor would have requested.

(305) Regarding the price reduction imposed by Alitalia, the Commission observes that the contract signed with Alitalia for the period 2001-2005 period envisaged a 7 % increase in prices in 2004 and in 2005, a rise which later proved excessive and was followed by reductions in 2006 and 2007 against a background of falling prices due to a more competitive environment. Given that the liberalisation of the sector could be expected ultimately to result in a reduction in prices, the Commission considers that SEA cannot reasonably claim that the reduction, which was largely an adjustment following an increase that had proved excessive and a reaction to the entry of a competitor, Aviapartner, in 2006, was an 'unforeseeable negative event'. The Commission takes the view that a private investor would have anticipated the change in the competitive environment brought about by the liberalisation of the sector.

For example, such an investor would not have counted on a 9 % price increase between 2003 and 2007 ([61]), and would have expected that SEA Handling's market share, while essentially reflecting a monopoly status, would have fallen.

(306) According to SEA, another 'unforeseeable event' which had serious negative repercussions on SEA Handling's return to viability was the loss of income after 2008 resulting from Alitalia's decision to reduce its services at Malpensa. The Commission recognises the significance of this withdrawal for SEA Handling's revenue, but it takes the view that SEA's efforts to improve SEA Handling's situation were intensified when the withdrawal was announced in 2007. The number of operative FTEs dropped almost 41 % between 2007 and 2010. As a result, the cost of labour fell between 2007 and 2009, while the growth in productivity accelerated. Other operating costs also fell 40 % between 2007 and 2010. Overall, thanks to these cost cuts following Alitalia's reduction in services, the company's gross operating margin improved, despite its drop in turnover. Nevertheless, these results did not put SEA Handling in a position to return to economic equilibrium within a short time, despite the aid granted previously. In addition, in a counterfactual scenario in which Alitalia had continued its services at Malpensa and SEA Handling's market share had remained at the 2005 level indicated by the Italian authorities, the calculations suggest that SEA Handling might have hoped to return to profitability in 2009, but the Commission takes the view that the efforts to cut costs in the period in question would not have been as far-reaching without Alitalia's withdrawal ([62]). In any event, the Court of Justice has reiterated that for an assessment of compliance with the private investor principle, it is not enough to rely on economic evaluations made after the advantage was conferred, on a retrospective finding that the investment made by the Member State concerned was actually profitable, or on subsequent justifications of the course of action actually chosen … where it appears that the private investor test could be applicable, the Commission is under a duty to ask the Member State concerned to provide it with all relevant information enabling it to determine whether the conditions governing the applicability and the application of that test are met, and it cannot refuse to examine that information unless the evidence produced has been established after the adoption of the decision to make the investment in question ([63]).

(307) The Italian authorities have confirmed that the potential gravity of the situation after Alitalia's withdrawal encouraged SEA to make efforts to improve costs.

(308) Finally, SEA Handling has also stated that unforeseen events had a negative impact on its results, and has referred in particular to the effects on its turnover of SARS, terrorist threats following the outbreak of war in Iraq in 2003, and the eruption of the Eyjafjallajökull volcano in 2010. The Commission observes that the only quantification of the impact of these events on SEA Handling's turnover was in the RBB Economics study of 1 June 2011. But here the study merely repeats statements made by SEA Handling, namely that SARS and the terrorist threats following the outbreak of war in Iraq in 2003 had led to a 3 % fall in turnover, and that the Eyjafjallajökull volcano eruption had caused a drop of EUR 1,5 million in turnover. The counterfactual analysis is based on these presuppositions, and does not provide any means of evaluating the effects of the events in question. In addition, the Commission considers that even if SEA's estimates could be regarded as reliable without any supporting evidence, the effects of the unforeseeable events indicated in the RBB Economics study would still not realistically justify SEA's continued injections of capital, which totalled nearly EUR 360 million in the period 2002-2010 period. Furthermore, the Commission considers that an investor operating under market conditions would probably have carried out a study immediately after such events took place, rather than several years later, in order to evaluate their impact and to decide whether to change its strategy, to continue with the strategy in place, or to amend its business plan. But as the RBB Economics study was drawn up several years after the opening decision, the Commission considers that it does not correspond to the conduct of a prudent private investor, but was carried out for the purposes of the present proceedings, in order to demonstrate *ex post* the supposed economic rationality of SEA's behaviour. The study consequently cannot be taken into account for the application of the prudent private investor test. Finally, the Commission observes that precisely in order to ensure the profitability of their investment even following negative events, private investors look for financial analyses that indicate the return on their investment in poor scenarios, particularly in industries such as air transport, which by its nature is exposed to risk factors that are outside the operators' competence and control. Neither Italy nor SEA has ever shown that such an analysis was carried out at the time of the measures in question.

(309) The Commission consequently takes the view that the efforts to cut costs, although they were substantial in several respects following the setting up of the company, and particularly after 2007, were not sufficient to envisage a return to profitability, or then only in the long term, that is to say in more than 10 years, and without considering the risk

([61]) As described in the SEA Handling's 'Piano aziendale 2003-2007'.
([62]) That the company's market share should continue until 2010 at the 2005 level, i.e. 76,65 %, is merely hypothetical.
([63]) Judgment in Case C-124/10 P *Commission* v *EDF*, paragraphs 85 and 104.

of having to return any illegal aid granted in the past. It is not surprising that after receiving public support for so many years SEA should have improved its results, but the Commission considers that given SEA Handling's extremely heavy cost structure and the context of market liberalisation, a private investor would have sought a much more far-reaching restructuring operation in 2002 before agreeing to cover the losses for the time needed to complete the restructuring process and to obtain a reasonable return on its investment within a reasonable time.

The comparison with the profits of other operators

(310) The Commission rejects the argument that no comparison can be made with the economic performance of other ground handling service providers of a different 'nature' (the Italian authorities cite airport managers operating with separate accounts, airport managers operating separate companies, airlines providing their own ground handling services, and outside providers, which may in turn be divided into providers with domestic or international networks and SMEs) or with a different area of activity (some providers offer all ground handling services while others offer only some).

(311) The very purpose of liberalising the sector is to stimulate competition so that the suppliers with the most competitive business models can establish themselves on the market, to the benefit of users, airlines and, ultimately, users. The Commission considers that the operators with which the Italian authorities do not wish to compare SEA Handling are nevertheless in actual or potential competition with it. The Italian authorities' argument *de facto* reduces the number of competitors comparable to SEA Handling to zero, since no operator provides exactly the range of services currently offered by SEA Handling, even where that operator is of the same 'nature', namely an undertaking linked to an airport manager but operating as a separate company. This is leaving aside the fact that SEA considers that the Commission ought also to take account of the methods by which Directive 96/67/EC has been implemented in order to compare the services provided by providers operating on a market other than Italy.

(312) Numerous ground handling service providers are structurally profitable. In any case, the fact that other ground handling operators may have incurred losses in the same period does not demonstrate the rationality of SEA's conduct, but rather seems to suggest the opposite, because any company faced with economic difficulties will seek to focus on its core business and stop any investments in to activities that generate structural losses or are less profitable. As already pointed out several times, in two of the business plans submitted SEA Handling emphasised that the market trend in the period in question was towards an end to investment by airport managers in ground handling services, and that operators that had subcontracted ground handling services were generally more profitable than vertically integrated operators.

(313) For similar reasons, the Commission must reject SEA's argument that the only comparable operator was […] ([64]), which is presumed to have suffered losses in the period 2004-2006 period ([65]) and did not subcontract its ground handling services. First, […] is still controlled by the State, so that its conduct cannot be considered typical of private operators ([66]). Second, the Commission does not have the information needed to determine whether […] had received financial aid towards its ground handling services that was comparable in terms of amount or duration to that received by SEA Handling.

(314) Finally, the Commission does not consider the comparison made by SEA Handling with […] and […] to be significant. SEA Handling claims that those operators had incurred losses from services provided at those airports without giving sufficient proof ([67]). Moreover, it would seem that the negative results of those operators were partly a consequence of the aid received by SEA Handling. Had SEA Handling not received repeated injections of capital from SEA, it would have become insolvent, and would have undergone a more rapid and in-depth restructuring process than it actually did. The structure of the market would have changed, and competitors would have had the opportunity to increase their market share and improve their profits.

([64]) […].
([65]) Observations of SEA Handling of 21 March 2011, paragraphs 99 and 100.
([66]) See: […].
([67]) Observations of SEA Handling of 21 March 2011, paragraph 105.

(315) In conclusion, the Commission considers that the capital injections in question do not pass the private investor test and consequently that they conferred on SEA Handling an advantage that it would not have obtained in normal market conditions.

8.2.4. EFFECT ON TRADE BETWEEN MEMBER STATES AND DISTORTION OF COMPETITION

(316) The measures affect trade between Member States and distort or threaten to distort competition in the internal market in that they favour a single undertaking, which is in competition with other ground handling service providers at Malpensa and Linate airports, and with all other providers authorised to operate there, many of which operate in more than one Member State, more especially since the liberalisation of the sector took effect in 2002.

8.2.5. CONCLUSION

(317) The Commission therefore concludes that measures taken by SEA to cover SEA Handling's losses constitute State aid within the meaning of Article 107(1) of the TFEU.

8.3. *COMPATIBILITY OF THE AID WITH THE INTERNAL MARKET*

(318) Since it considers that the measures in question constitute State aid within the meaning of Article 107(1) of the TFEU, the Commission has examined their compatibility in light of the exemptions provided for Article 107(2) and (3).

(319) Article 107(2) is clearly not applicable, given the nature of the measures in question, and it has not been invoked by Italy or SEA.

(320) Regarding Article 107(3), in the opening decision the Commission expressed its concern regarding the compatibility of the measures with the Aviation Sector Guidelines. Those guidelines set out the way in which the Commission will evaluate the public funding of airport services under the rules and procedures governing State aid.

(321) With regard to the subsidising of airport services, the Aviation Sector Guidelines refer to Directive 96/67/EC, according to which above the threshold of two million passengers ground handling services must be self-financing, and must not be cross-subsidised by the airport's other commercial revenue or by public resources granted to it as airport authority or operator of a service of general economic interest.

(322) It must be pointed out, therefore, that subsidisation of such activities by public authorities runs counter to the objectives laid down in Directive 96/67/EC and may have a negative effect on the liberalisation of the market.

(323) The Commission accordingly considers that the aid cannot be declared compatible with the internal market on the basis of the Aviation Sector Guidelines.

(324) In the alternative, the Italian authorities have asked the Commission to evaluate the compatibility of the aid under Article 107(3)(c) of the TFEU and the 2004 Restructuring Guidelines. The Italian authorities have not sought to rely on any other legal basis that might demonstrate the compatibility of the aid in question with the internal market in the light of Article 107(3), nor have they submitted any evidence to demonstrate such compatibility to the Commission. The Italian authorities have in fact stated that the Aviation Sector Guidelines are not applicable to an assessment of the compatibility of the measures in question. Consequently, the Commission must analyse the arguments put forward by the Italian authorities to demonstrate the compatibility of the aid as aid towards restructuring.

(325) According to point 104 of the 2004 Restructuring Guidelines:

> The Commission will examine the compatibility with the common market of any rescue or restructuring aid granted without its authorisation …on the basis of these Guidelines if some or all of the aid is granted after their publication in the *Official Journal of the European Union*. In all other cases it will conduct the examination on the basis of the Guidelines which apply at the time the aid is granted.

(326) The 2004 Restructuring Guidelines were published on 1 October 2004.

(327) Since the Commission considers that the measure in question must be understood as a series of decisions for injections of capital into SEA Handling to cover its operating losses as they arose, rather than as one or two instalments of aid for restructuring (as the Italian authorities seem to argue, see paragraph 84), the compatibility of the measures must be examined in light of the Restructuring Guidelines of 1999 and 2004, depending on whether they were the subject of binding commitments given before or after 1 October 2004 ([68]).

Eligibility of the firm

Measures taken before 1 October 2004

(328) On the grounds outlined in paragraphs 174-180, the Commission considers that SEA Handling can be considered a firm in difficulty within the meaning of the 1999 Restructuring Guidelines.

(329) Under point 7 of those Guidelines, a newly created firm is not eligible for rescue or restructuring aid. However, the Guidelines state that the creation by a company of a subsidiary merely as a vehicle for receiving its assets and possibly its liabilities is not regarded as the creation of a new firm. Since SEA Handling was created as the result of a separation by SEA to provide ground handling services, the Commission considers that SEA Handling is not to be regarded as a newly created firm within the meaning of the Guidelines.

(330) In addition, SEA Handling's financial difficulties do not derive from an arbitrary distribution of costs within the group. They were not imputable to the holding company SEA, but were due at most to the excessive cost of labour, as a result of which the company was unable to balance its accounts.

Measures taken after 1 October 2004

(331) The Commission observes that there was no improvement in the company's financial situation in 2004 compared to 2002. As explained in paragraphs 181-184, the company continued to face financial difficulties in 2004, and had to be considered a firm in difficulty under the 2004 Restructuring Guidelines.

(332) Point 13 of those Guidelines states that a newly created firm is not eligible for rescue or restructuring aid. This is the case, for instance, where a new firm emerges from the liquidation of a previous firm or merely takes over such firm's assets. A firm will in principle be considered as newly created for the first three years following the start of operations in the relevant field of activity.

(333) For the reasons given in paragraph 330, the Commission considers that SEA Handling cannot be considered a newly created firm. The Commission observes that, in their last letter, the Italian authorities affirmed that SEA Handling was to be regarded as a newly created firm under the 2004 Restructuring Guidelines, as it was set up as the result of a spin-off of SEA's existing ground handling division, and therefore took over the assets and liabilities of the parent company relating to the provision of ground handling services.

(334) The considerations set out in paragraph 331 apply here again.

(335) The Commission concludes that SEA Handling was eligible for restructuring aid under the 1999 and 2004 Restructuring Guidelines.

Return to long-term viability

(336) According to the 2004 Restructuring Guidelines, The grant of the aid must be conditional on implementation of the restructuring plan which must be endorsed by the Commission in all cases of individual aid (point 34 of the 2004 Restructuring Guidelines and point 31 of the 1999 Restructuring Guidelines). Moreover, Restructuring aid must therefore be linked to a viable restructuring plan to which the Member State concerned commits itself. The plan must be submitted in all relevant detail to the Commission (point 35 of the 2004 Restructuring guidelines and point 32 of the 1999 Restructuring Guidelines).

([68]) It should be noted that if the if the argument of the Italian authorities were correct only the 2004 Restructuring Guidelines would apply, but the assessment of compatibility would remain unchanged.

(337) First, the 'restructuring plans' cited by the Italian authorities are the 2002-2006 consolidated business plan ('Piano aziendale consolidato 2002-2006'), the SEA 2003-2007 business plan ('Piano aziendale 2003-2007 SEA'), the 2007-2012 strategic plan ('Piano strategico 2007-2012'), the 2009-2016 strategic plan ('Piano strategico 2009-2016'), and the 2011-2013 business plan ('Piano aziendale 2011-2013'). The Commission, on the basis of the evaluation of the documents set out in paragraphs 269-296 of this Decision, takes the view that none of these satisfies the criteria imposed by the Guidelines.

(338) More specifically, point 35 of the 2004 Restructuring Guidelines states: The restructuring plan, the duration of which must be as short as possible, must restore the long-term viability of the firm within a reasonable timescale and on the basis of realistic assumptions as to future operating conditions. Restructuring aid must therefore be linked to a viable restructuring plan … submitted in all relevant detail to the Commission [which must] include, in particular, a market survey. The improvement in viability must derive mainly from internal measures contained in the restructuring plan; it may be based on external factors such as variations in prices and demand over which the company has no great influence, but only if the market assumptions made are generally acknowledged. Point 32 of the 1999 Restructuring Guidelines contains a similar provision.

(339) The Commission observes that both the 2002-2006 consolidated business plan and the plans for the period after 2007 ([69]), with the exception of the 2003-2007 business plan, concern SEA as a whole, and make only isolated reference to SEA Handling. Accordingly, they cannot be regarded as plans for the restructuring of SEA Handling within the meaning of the Guidelines. Nor do they contain all the necessary information required by the Guidelines, namely a detailed description of the circumstances behind the firm's difficulties and a market study. Furthermore, they do not give a detailed description of the measures needed to restore the long-term viability of the firm within a reasonable timescale, and they envisage an improvement in profitability primarily thanks to external measures securing an increase in revenue (this is particularly true of the 2003-2007 business plan), without in any way showing that the hypotheses put forward for market trends are generally accepted.

(340) The brief passages in these documents referring specifically to SEA Handling do not contain schedules indicating the timescales reasonably needed in order to restore the long-term viability of SEA Handling, nor the duration of a potential restructuring process. The restructuring measures therefore offer too little detail to satisfy the requirements in the Guidelines.

(341) As a result, the payments of aid in question were granted before being notified and in the absence of a restructuring plan that satisfied the conditions of the restructuring guidelines. Consequently, they were not conditional on implementation of a restructuring plan of the kind indicated in points 34 and 35 of the 2004 Restructuring Guidelines or points 31 and 32 of the 1999 Restructuring Guidelines. This alone is sufficient to exclude compatibility with the internal market ([70]).

(342) Second, it should be noted that given the lack of notification of the aid and of a viable restructuring plan, the Commission did not have the opportunity to lay down the conditions and obligations it deemed necessary for the aid to be authorised ([71]), nor was it able to monitor the correct implementation of the restructuring plan on the basis of regular and detailed reports ([72]).

Prevention of undue distortion of competition

(343) According to point 38 of the 2004 Restructuring Guidelines, In order to ensure that the adverse effects on trading conditions are minimised as much as possible, so that the positive effects pursued outweigh the adverse ones, compensatory measures must be taken. Otherwise, the aid will be regarded as 'contrary to the common interest' and therefore incompatible with the common market. Point 35 of the 1999 Restructuring Guidelines contains a similar provision.

(344) The Italian authorities and SEA Handling state that the aid measures did not distort competition in the ground handling services market, because they were necessary in order to satisfy the conditions for the liberalisation of the market in accordance with Legislative Decree No 18/99, implementing Directive 96/67/EC.

(345) They add that proper measures were taken alongside the aid in order to avoid any distortion of competition.

([69]) See 'Executive Summary — Linee guida del piano strategico 2007-2012 del gruppo SEA-11 maggio 2007', 'Piano strategico 2009-2016', and 'Piano aziendale SEA 2011-2013'.

([70]) See, for example, the judgment of the EFTA Court of 8 October 2012 in *Hurtigruten* v *EFTA Surveillance Authority,* paragraphs 228 and 234-240.

([71]) Guidelines, points 46-48.

([72]) Guidelines, points 49-51.

(346) According to the Italian authorities, the first such measure was a reduction in the capacity of SEA Handling, particularly in terms of workforce, through gradual staff cuts between 2003 and 2010.

(347) The second such measure reduced the presence of SEA Handling on the market by scaling down its range of activities. Specifically, SEA Handling ended its aircraft maintenance and ticketing services, and some secondary services such as cabin cleaning and assisting underage passengers, which it entrusted to outside parties from of 2004 onward. SEA Handling also transferred its de-icing services to SEA in 2004.

(348) The third measure consisted of attempts to sell a minority share in SEA Handling which, had they been successful, would have resulted in the entry of a new competitor to the market.

(349) Finally, the Italian authorities consider that the high degree of liberalisation of the ground handling market in Italy necessitated the measures to cover losses in order to ensure the continuity and quality of all ground handling services and to adapt gradually to the new situation. Overall, therefore, the aid payments allowed an orderly transition to a competitive market, while avoiding any negative consequences for passengers.

(350) The Commission points out that Write-offs and closure of loss-making activities which would at any rate be necessary to restore viability will not be considered reduction of capacity or market presence for the purpose of the assessment of the compensatory measures ([73]). The Commission takes the view, therefore, that the second measure does not constitute a 'compensatory' measure but is rather an integral, and even essential, part of the restructuring operation itself. As suggested by the Italian authorities, these activities do not form part of SEA Handling's core business; their withdrawal cannot therefore be considered a compensatory measure aimed at bringing about a significant reduction in the company's presence in the market ([74]).

(351) Similarly, a reduction of capacity, particularly in terms of the workforce, is an essential step in restoring the company's viability, given SEA Handling's extremely high staff costs, especially compared with its turnover, and cannot be seen as a measure to offset the aid granted.

(352) Regarding the intention to sell a minority share, the Commission observes that only two competitive bidding procedures have been initiated to date ([75]). Moreover, the sale is currently conditional on the restoration of viability, and therefore does not constitute a measure to compensate for the restructuring operation. In any case, in around 10 years there have been no transfers of SEA Handling capital, and the intention to transfer cannot be considered a measure to offset the aid.

(353) Finally, regarding the argument that the aid ensured the transition to a competitive market, the Commission takes the view that the transposal of Directive 96/67/EC into Italian law does not mean that State aid may be granted in order to compensate particular operators, in this case SEA Handling, so as to smooth their adjustment over a given period, the exact duration of which has in any event not been mentioned by the Italian authorities.

(354) These circumstances are sufficient to rule out the compatibility of the aid with the internal market.

Aid limited to the minimum

(355) In accordance with point 43 of the 2004 Restructuring Guidelines and point 40 of the 1999 Restructuring Guidelines, in order to limit the amount of aid towards restructuring costs to the strict minimum, beneficiaries will be expected to make a significant contribution to the restructuring plan from their own resources, including the sale of assets that are not essential to the firm's survival, or from external financing at market conditions In the case of large firms the Commission usually considers a contribution to the restructuring of at least 50 % to be appropriate.

(356) The Italian authorities have not submitted any information regarding any significant contributions to the restructuring process made by SEA Handling. The fact that no private investor contributed financially to the restructuring of SEA Handling is an additional sign that the market did not believe in the feasibility of the firm's return to viability (point 43 of the 2004 Guidelines).

([73]) Guidelines, point 40.
([74]) Judgment of the General Court in Joined Cases T-115/09 and T-116/09 *Electrolux* v *Commission*, paragraphs 51-58.
([75]) As indicated by the Italian authorities, one was initiated in 2001 and the other in 2007.

The 'one time last time' rule

(357) Finally, in order to be deemed compatible, restructuring aid must comply with the 'one time last time' rule. Point 43 of the 1999 Restructuring Guidelines and point 72 in point 43 of the 2004 Guidelines state that where a firm has received restructuring aid in the last 10 years it may not receive additional restructuring aid. On this basis, the Commission concludes that the restructuring aid granted to SEA Handling after the first injection of capital in 2002 was incompatible with the internal market, given that it did not comply with the 'one time last time' rule. The same applies to the aid received in 2007, if it is considered that SEA took two decisions for the provision of aid in instalments over successive years, as the Italian authorities seem to argue (see paragraph 223).

Conclusions

(358) The arguments set out above show that the aid measures do not satisfy the tests of the Aviation Sector Guidelines or those in the 1999 and 2004 Restructuring Guidelines so as to be considered compatible under Article 107(3)(c) of the TFEU.

(359) Consequently, the aid is not compatible with the internal market.

8.4. *RECOVERY*

(360) Article 14(1) of Regulation (EC) No 659/1999 states that all unlawful aid that is incompatible with the internal market must be recovered from the beneficiary.

(361) This aid was granted to SEA Handling unlawfully and is incompatible with the internal market, and must therefore be recovered from the company.

(362) Given the severely compromised financial situation of SEA Handling, and the lack of any prospect of profit from the capital injections, a private investor would not have carried out the capital injections, and consequently SEA Handling would not have been able to secure such funds on the market. As the return on capital investments is a factor in the viability of the firm's business model, a private investor would not make the investment without being certain that it would be adequately indemnified by the company for the risks involved. Accordingly, the Commission considers that the firm would not have been able to increase its share capital on the capital market, since the expected yield would not have enabled it to offer such a large return to any potential investor. The counterfactual situation, that is to say the situation that would obtain in the absence of the aid that recovery is intended to restore or to bring about, is therefore that no capital would have been invested at all ([76]). According to established case-law, 'Where an equity injection is involved, the Commission can take the view that abolition of the advantage granted must require the repayment of the capital contributed' ([77]). The amount of aid to be recovered is therefore the total amount by which the firm's capital was increased.

(363) For purposes of such recovery account must also be taken of the interest accruing from the date on which each instalment of aid was at the disposal of the company, namely the effective date of each increase in capital, to the date of its recovery ([78]).

8.5. *CONCLUSION*

(364) The Commission finds that Italy has unlawfully granted aid consisting of a number of injections of capital made by SEA into its subsidiary SEA Handling with the aim of covering the subsidiary's losses, contrary to Article 107(1) of the TFEU.

(365) Italy must therefore take all the necessary measures to recover the State aid deemed incompatible with the internal market from the recipient, SEA Handling,

HAS ADOPTED THIS DECISION:

([76]) Commission Decision 2012/252/EU of 13 July 2011 on State aid No C 6/08 (ex NN 69/07) implemented by Finland in favour of Ålands Industrihus Ab (OJ L 125, 12.5.2012, p. 33).

([77]) Judgment of the General Court in Case T-16/96 Cityflyer v Commission [1998] ECR II-757, paragraph 56.

([78]) Article 14(2) of Regulation (EC) No 659/99, cited above.

Article 1

The injections of capital made by SEA into its subsidiary SEA Handling for each of the financial years in the period 2002-2010, amounting to an estimated total of around EUR 359,644 million, not including recovery interest, constitute State aid within the meaning of Article 107 of the TFEU.

Article 2

That State aid was granted contrary to Article 108(3) of the TFEU and is incompatible with the internal market.

Article 3

1. Italy shall recover the aid referred to in Article 1 from the beneficiary.

2. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiary until their actual recovery.

3. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ([79]).

Article 4

1. Recovery of the aid referred to in Article 1 shall be immediate and effective.

2. Italy shall ensure that this Decision is implemented within four months of its notification.

Article 5

1. Within two months of the notification of this decision, Italy shall submit the following information to the Commission:

(a) the total amount (capital and interest) to be recovered from the recipient;

(b) a detailed description of the measures taken or planned in order to comply with this Decision;

(c) documents demonstrating that the beneficiary has been ordered to repay the aid.

2. Italy shall inform the Commission of the progress of national measures adopted in implementation of this Decision until the entirety of the aid referred to in Article 1 is recovered. Moreover, at the request of the Commission, Italy shall immediately submit any information relevant to measures taken or planned in order to comply with this Decision. It shall also provide detailed information regarding the amount of aid and interest recovered from the recipient.

Article 6

This Decision is addressed to the Italian Republic.

Done at Brussels, 19 December 2012.

For the Commission

Joaquín ALMUNIA

Vice-President

([79]) OJ L 140, 30.4.2004, p. 1.